

## Constitutional Citizenship Through the Prism of Alienage

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*This article addresses the question of how the increasing revival of interest in citizenship as a basis for rights in constitutional thought will affect aliens—people who lack citizenship by formal definition. Specifically, the article considers the question whether aliens will necessarily suffer in the wake of the recent citizenship turn in constitutional law and theory. Although there is a good case to be made that aliens will be disadvantaged, some constitutional commentary from the 1970's provocatively suggests that the position of aliens would not necessarily be undermined if we were to recast our conception of constitutional rights in the language and structures of citizenship. This article contends that the prospect of citizenship for aliens, however paradoxical, is not impossible. This is because citizenship is, in our law and conventional understandings, a divided construct. The status of citizenship and the rights we associate with citizenship are not always coextensive. We conventionally talk about "second-class citizens": these are people who enjoy status citizenship but who nevertheless are denied the enjoyment of citizenship rights or "equal citizenship." Aliens may, conversely, be said to enjoy certain incidents of "equal citizenship" in our society by virtue of their possession of an important range of fundamental rights, notwithstanding their lack of status-citizenship.*

*But while "alien citizenship" is not an entirely incoherent notion within the terms of conventional constitutional thought, this article argues that the citizenship that noncitizens can aspire to remains limited in scope. This is because the constitutional ideal of equal citizenship is committed not only to universal rights (thereby including aliens) but also to an ethic of national solidarity and to a practice of bounded national membership. It is by virtue of these nationalist commitments that aliens—so long as they remain aliens—can aspire to partial citizenship at best.*

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## I. INTRODUCTION

Notwithstanding Alexander Bickel's declaration a generation ago that the concept of citizenship is of little significance in American constitutional law,<sup>1</sup> the idea of citizenship has enjoyed a huge resurgence of interest in constitutional law scholarship in recent years. Much of the literature concerned with citizenship today deploys the concept in the mode of normative political theory, with scholars embracing the concept as an aspirational ideal for our national political life. Citizenship is portrayed in this literature as embodying the highest political values: democracy, egalitarianism, pluralism, civic virtue, community—and sometimes, all of these at once.

Constitutional theorists' decidedly romantic preoccupation with citizenship in recent years echoes the work of theorists in neighboring disciplines for whom the concept of citizenship has likewise become a central normative benchmark.<sup>2</sup> Yet the work of many constitutional scholars goes beyond normative theory per se; increasingly, many have sought to attach the commitments they ascribe to the idea of citizenship to constitutional text. In particular, many have urged that the concept of constitutional citizenship should be read to encompass and ground our most basic individual rights. There is today a burgeoning movement in constitutional theory to recast our constitutional rights framework in the language and structures of citizenship.

In their efforts to reorient constitutional rights discourse around the idea of citizenship, scholars have pursued a variety of textual strategies. Some invoke the Privileges or Immunities Clause of the Fourteenth Amendment, urging interpretive restoration of this long-dormant provision to Fourteenth Amendment jurisprudence.<sup>3</sup> Others have seized on the Amendment's Citizenship Clause. Despite its usual

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<sup>1</sup> Alexander M. Bickel, *Citizenship In the American Constitution*, 15 ARIZ. L. REV. 369 (1973).

<sup>2</sup> As one commentator has recently noted, the "ideal of citizenship has become a 'big tent' under which a wide range of initiatives . . . can find shelter. Indeed, public and policy intellectuals have reclaimed it as a legitimating sign under which to pursue new, diverse, and conflicting projects of political transformation and cultural renewal." David Scobey, *The Specter of Citizenship*, 5 CITIZENSHIP STUDIES 11, 21 (2001). For additional reviews of the broad-ranging literature on citizenship in political and social thought, see Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352 (1994); Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447 (2000).

<sup>3</sup> The Supreme Court's 1999 decision in *Saenz v. Roe*, 526 U.S. 489 (1999), dramatically intensified the interest in the Privileges or Immunities Clause and has fueled a debate over the question whether the Clause is likely to enjoy a full-scale renaissance. See, e.g., Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 (1999); F.H. Buckley, *Liberal Nationalism*, 48 UCLA L. REV. 221 (2000); Tim A. Lemper, Note, *The Promise and Perils of "Privileges or Immunities": Saenz v. Roe*, 119 S. Ct. 1518 (1999), 23 HARV. J.L. & PUB. POL'Y 295 (1999).

interpretation as a definitional provision,<sup>4</sup> these commentators argue that the clause should be understood to guarantee basic substantive rights as well.<sup>5</sup> Still others have located the idea of constitutional citizenship in the Equal Protection Clause. In this reading, the clause's core animating principle is the principle of "equal citizenship."<sup>6</sup>

The citizenship turn in constitutional theory has important merits. Among other things, reincorporating Fourteenth Amendment citizenship into our rights discourse might, as some scholars have argued, provide the foundation for a more coherent rights jurisprudence. Those seeking a revival of the Privileges or Immunities Clause in particular regard the effective disabling of the clause both in *The Slaughter-House Cases*<sup>7</sup> and the subsequent development of individual rights jurisprudence under the aegis of the Due Process and Equal Protection Clauses, as having produced deep irrationalities in the doctrine.<sup>8</sup> It might well be true that the revitalization of the Privileges or Immunities Clause would help to rationalize—and perhaps even to deepen—the various doctrines of substantive, fundamental rights.<sup>9</sup>

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<sup>4</sup> This is the classic reading. See, e.g., *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 94 (1872) (Field, J., dissenting) ("The first clause of this [the Fourteenth] Amendment determines who are citizens of the United States, and how their citizenship is created."); T. Alexander Aleinikoff, *Re-reading Justice Harlan's Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961, 964 (1992) ("[The Fourteenth Amendment] provided, for the first time, a constitutional definition of citizenship . . .").

<sup>5</sup> See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 33–66 (1969). For additional citations to a fast-growing body of scholarship advancing such an "aggressive reading" of the clause, see Christopher Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297, 1328 n.117 (1994).

<sup>6</sup> Against the suggestion that the Equal Protection Clause is not the appropriate textual home for the principle of equal citizenship, Kenneth Karst argued in 1977 that the Equal Protection Clause "shows every sign of being able to bear the full meaning of the equal citizenship principle." Kenneth L. Karst, *Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 43 (1977).

<sup>7</sup> *The Slaughter-House Cases*, 83 U.S. (16 Wall.) at 36. As one commentator described the case, the Court held that the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment "protected only what was already otherwise protected in the Constitution." Lino A. Graglia, *Do We Have An Unwritten Constitution?—The Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 83, 83 (1989).

<sup>8</sup> See sources cited *infra* note 55.

<sup>9</sup> Some progressives have suggested that a revival of the Privileges or Immunities Clause could serve the interests of the marginalized and excluded. See, e.g., Angela P. Harris, *Beyond Equality: Power and the Possibility of Freedom in the Republic of Choice*, 85 CORNELL L. REV. 1181, 1183 (2000) ("[T]he Privileges or Immunities Clause was about freedom: specifically, the freedom of six million or so people of African descent . . . [It was] an exercise in considering the relevance of [the already-existing literature on natural rights] to the project of emancipation."). Harris describes this project in lamenting terms as the "road not taken." *Id.* at 1184.

Note, however, that proponents of a revitalization of the Privileges or Immunities Clause have included supporters of limited government, judicial restraint, and laissez-faire constitutionalism. See, e.g., Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause*

It is also true that the idea of “citizenship” as an organizing value possesses substantial normative resonance and power.<sup>10</sup> The concept of citizenship is particularly valuable in its evocation of a mutual and engaged relationship between the political community and its members. This is a relationship that some traditional rights theory has, arguably, sometimes obscured or ignored to its detriment.

Despite its potential benefits, however, this turn to the idea of citizenship as foundation for constitutional rights is not without its costs.<sup>11</sup> Perhaps the principal one has to do with its effects on the status of aliens. If rights are defined as an attribute of citizenship, what then of those who lack citizenship by legal definition? Those formally lacking in citizenship would seem to fall, at least arguably, outside the scope of this normative discourse. Bickel himself warned thirty years ago that aliens would suffer under a citizenship-centered constitutional regime,<sup>12</sup> and this concern remains pressing today. Notwithstanding the common criticism that the idea of rights grounded in the status of personhood is excessively “thin,”<sup>13</sup> I believe that we can be justifiably proud of a constitutional system that treats non-citizens as entitled to a substantial measure of community recognition and protection.<sup>14</sup> Whether such recognition and protection would withstand adoption of a rights regime organized around the idea of constitutional citizenship remains an open question.

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*of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63 (1989); see also Phillip Kurland, *The Privileges or Immunities Clause: “Its Hour Come Round at Last”?*, 1972 WASH. U. L.Q. 405, 414 (1972) (describing support of “privileges or immunities as a means to establish a constitutional doctrine of laissez-faire with regard to industrial and commercial activities”).

<sup>10</sup> Bosniak, *supra* note 2, at 450–53, 489–91; Nancy Fraser & Linda Gordon, *Civil Citizenship Against Social Citizenship? On the Ideology of Contract-versus-Charity*, in THE CONDITION OF CITIZENSHIP 90, 90 (Bart Van Steenberg ed., 1994) (describing citizenship as “a weighty, monumental, humanist word” that has “no pejorative uses”).

<sup>11</sup> One of these, as I have suggested above, is that the concept is so utterly flexible and protean in meaning that its usefulness in analytic discussion is sometimes compromised. I have addressed the multiple meanings of citizenship in an earlier paper. See Bosniak, *supra* note 2.

<sup>12</sup> Bickel, *supra* note 1.

<sup>13</sup> Kymlicka & Norman, *supra* note 2, at 354.

<sup>14</sup> For discussion of the development and significance of the American jurisprudence of personhood and its impact on noncitizens, see, for example, Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955 [hereinafter Bosniak, *Exclusion and Membership*]; Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994) [hereinafter Bosniak, *Difference That Alienage Makes*]; see also Aleinikoff, *supra* note 4; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990). The Supreme Court forcefully reiterated its longstanding position that aliens enjoy fundamental rights as territorially-present persons in the recent decision *Zadvydas v. Davis*, in which Justice Breyer wrote for the majority that “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

the principle of “equal citizenship.”<sup>68</sup> For Karst, citizenship status is a “simple idea,”<sup>69</sup> a “constitutional trifle,”<sup>70</sup> whereas the broader conception of equal citizenship entails “the dignity of full membership in the society,”<sup>71</sup> and constitutes, for this reason, the fundamental normative value of our national life.<sup>72</sup>

There are good reasons for approaching citizenship in this hierarchical fashion. Doing so represents a response to the history of discrimination in this country and elsewhere, pursuant to which the formal citizenship status of subordinated groups has been recognized while these groups have, at the same time, remained excluded and marginalized in many significant respects. Scholars’ normative prioritization of rights citizenship over status citizenship can be read, in other words, as part of a critique of legal arrangements whereby individuals possess formal citizenship status but experience *de facto* exclusion and powerlessness. Such a critique is often articulated as the critique of “second-class citizenship.”

“Second-class citizenship” is a concept that has been normatively powerful in American political and legal discourse. In rhetorical terms, it has been quite effective in conveying the idea that the extension of the formal status of citizenship, alone, can mask real oppression and thereby represents a largely empty husk.<sup>73</sup> Much of the history of citizenship in this country can be, and has been, recounted in these terms.<sup>74</sup> After the passage of the Fourteenth Amendment, African-Americans possessed formal citizenship but remained subordinated in virtually every sphere. Likewise, for many years women were recognized as possessing the nominal status of citizenship, and yet they were denied the franchise and other fundamental incidents of

<sup>68</sup> Karst describes the principle of equal citizenship not merely as a constitutional mandate but as “an ideal, a cluster of value premises.” Karst, *supra* note 6, at 5.

<sup>69</sup> *Id.* at 5 (quoting ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 54 (1975)).

<sup>70</sup> *Id.*; see also KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 10 (1989) (“I agree that the bare legal status of citizenship is a constitutional trifle . . .”).

<sup>71</sup> Karst, *supra* note 6, at 5; see also KARST, *supra* note 70, at 10 (“[R]eal membership in the community is more than a legal status . . .”).

<sup>72</sup> For other articulations of this antimony, see, for example, BLACK, *supra* note 5, at 53 (arguing that the Citizenship Clause does not simply bestow an “honorific label” but it also mandates, more substantively, “incorporation and participation in society”); Note, *supra* note 27, at 1946 (“Although the title of ‘citizen’ has been reduced to a mere legal status, the belief that ‘citizenship means something’ remains a powerful emotional and symbolic legacy in our political traditions.”).

<sup>73</sup> See *The Civil Rights Cases*, 109 U.S. 3, 26–62 (Harlan, J., dissenting); Kinoy, *supra* note 60, at 403.

<sup>74</sup> See, e.g., Kenneth Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 288 (1983) (stating that formal citizenship never guaranteed full societal membership; “[a]ctual membership was determined by additional tests of religion, perhaps, or race or language or behavior, tests that varied considerably among segments and over time.” (quoting ROBERT H. WIEBE, *THE SEGMENTED SOCIETY: AN INTRODUCTION TO THE MEANING OF AMERICA* 95 (1975))).

membership. Sometimes, the denial of rights to citizens was overtly defended. The citizenship of some groups was simply deemed to be less complete than that of others. Increasingly, however, rights that we now regard as integral to citizenship were denied to status citizens through court decisions maintaining that these rights fell outside the core substantive requirements of citizenship. The classic example is the decision in the 1875 case of *Minor v. Happersett*, in which the Supreme Court concluded that voting was not a “privilege or immunity of citizenship.”<sup>75</sup>

The critique of second-class citizenship is thus a critique of citizenship formalism, whereby nominal membership serves to mask the continued exclusion and social domination of historically marginalized groups. It is a critique of citizenship minimalism as well; it rejects the notion that the class of citizens can be defined as pure status holders without being acknowledged and empowered as active community participants, and it demands recognition and effectuation of rights and protections that make community membership meaningful.<sup>76</sup>

While this is an indispensable form of political and legal criticism, the second-class citizenship critique also suffers from certain limitations. One problem is that the focus on the denial of rights to status citizens often renders the critique insensitive to the history of systematic denial of citizenship status itself to members of subordinated groups in this country. Important recent scholarship on Asian and other non-white exclusion from naturalization eligibility, and on the history of married women’s

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<sup>75</sup> *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 171 (1875). Proponents of “economic citizenship” today would argue that Congress and the courts have wrongfully excluded economic rights from the scope of substantive citizenship as well.

<sup>76</sup> While most invocations of the idea of “second-class citizenship” counterpose the possession of formal citizenship status with the denial of substantive rights, the term has sometimes been used to describe the imposition of lesser forms of citizenship status itself. *See, e.g.*, *Schneider v. Rusk*, 377 U.S. 163, 169 (1964) (holding that a statute which deprived naturalized citizens of their citizenship status if they resided abroad for three years in their place of original nationality or birth creates “a second-class citizenship”); *see also* *Knauer v. United States*, 328 U.S. 654, 658 (1946) (“Citizenship obtained through naturalization is not a second-class citizenship.”); *Rogers v. Bellei*, 401 U.S. 815 (1971).

Members of the Supreme Court have often used the concept of “second-class citizenship” in an offhand and unexamined way to refer to a condition of exclusion, stigma, or less favorable treatment experienced by a subject group (most often African-Americans and other racial minorities; sometimes veterans, juveniles or others). In one case, however, there is a brief exchange among the Justices about the concept: Justice Black, dissenting in *Rogers v. Bellei*, argues that “[u]nder the view adopted by the majority today, all children born to Americans while abroad would be excluded from the protections of the Citizenship Clause and would instead be relegated to the permanent status of second-class citizenship, subject to revocation at the will of Congress.” 401 U.S. at 839 (Black, J., dissenting). The majority, in response, describes this characterization—that the holding imposes second-class citizenship—as a “cliche [that] is too handy and too easy, and, like most cliches, can be misleading.” *Id.* at 835. Perhaps in part because second-class citizenship is an inherently critical term, it is far more often invoked in dissenting than in majority opinions.

Nevertheless, these implications for the status of aliens represented by the turn to citizenship are most often ignored by constitutional scholars. Even among progressive scholars, who by definition are concerned with the marginalized and excluded, the subject is rarely on the radar screen. Progressive constitutional scholars have recently urged the recognition of the citizenship of gays and lesbians<sup>15</sup> and of the economically marginalized,<sup>16</sup> along with racial minorities, women, and others, without, in most cases, acknowledging the potential doctrinal and rhetorical costs that doing so might pose to noncitizens.<sup>17</sup>

Among those scholars who *have* addressed the question, the conventional view is that the grounding of constitutional rights in the idea of citizenship runs the risk of excluding aliens. Laurence Tribe, for instance, has recently noted that a revival of the Privileges or Immunities Clause may ultimately result in the denial to aliens of the constitutional protection they now enjoy under substantive due process: “there may be no convincing escape,” he writes, “from the conclusion that the Privileges or Immunities Clause, while providing a sounder basis than the Due Process Clause for the protection of substantive rights, protects only a limited group of persons—United States citizens.”<sup>18</sup> Similarly, John Ely wrote a generation ago that, in light of the express terms of the Privileges or Immunities Clause, most commentators see themselves as “stuck with the conclusion that only citizens are protected.”<sup>19</sup>

For some commentators, such an outcome is not particularly troubling. Their view is that citizenship is a constitutional value too long ignored in this country, and that once revived, citizenship rights belong, quite naturally and rightfully, to those who possess citizenship status. For those of us concerned with the condition and well-being of noncitizens, however, their exclusion from this potential new domain of rights is indeed worrisome. Charles Black, for example, noted in the course of outlining his structural argument for grounding constitutional rights in the Citizenship Clause that he used the word “citizen” hesitatingly because the “inference of rights from citizenship” might be regarded as excluding or otherwise disadvantaging aliens.<sup>20</sup> I myself in earlier work have questioned the turn to citizenship as a basis for

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<sup>15</sup> William N. Eskridge, *The Relationship Between Obligations and Rights of Citizens*, 69 *FORDHAM L. REV.* 1721, 1742–49 (2001); see also Mark Strasser, *The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel*, 52 *RUTGERS L. REV.* 553 (2000) (urging that the Privileges or Immunities Clause be interpreted to protect the right of same-sex couples to wed).

<sup>16</sup> See William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 *MICH. L. REV.* 1, 7–9 (1999); Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 *Cornell L. Rev.* 523 (1997).

<sup>17</sup> Linda S. Bosniak, *Universal Citizenship and the Problem of Alienage*, 94 *Nw. U. L. REV.* 963 (2000).

<sup>18</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 7-6, at 1325 (3d ed. 2000).

<sup>19</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 25 (1980).

<sup>20</sup> BLACK, *supra* note 5, at 52–53; see also Kurland, *supra* note 9, at 415.

rights for precisely the same reason: I argued that grounding rights in the concept of citizenship is problematic because doing so would likely redound against those individuals who lack citizenship status by legal definition.<sup>21</sup>

The question of whether the exclusion of aliens from the domain of basic rights is a good or bad thing is, of course, a longstanding one. But that question is not my concern here, at least not directly. Rather, the focus of the present paper is the basic factual premise which underlies this dispute in the first instance: namely, that a return to citizenship as rights necessarily entails an exclusion of, or disadvantage to, noncitizens. I want to argue here that the premise that citizenship rights must be confined to status citizens is less secure than we tend to assume.

My initial impetus for the argument derives, in part, from reading constitutional theory of the 1970s and 1980s on the subjects of citizenship and alienage. While citizenship was not the fashionable concept it has since become, some scholars at the time argued that a reorientation of constitutional rights discourse around the concept of citizenship would serve as an antidote to the peculiarities of the substantive due process doctrine and, in the view of some, would serve as a response to the chronic legal marginalization and subordination of African Americans in American life. Thus, Charles Black, Phillip Bobbit, John Ely, Kenneth Karst, Philip Kurland, and others each defended a return to citizenship as a basis for rights in constitutional law (though by way of several different doctrinal routes). In so doing, each of these scholars recognized the potential cost of doing so to noncitizens. Yet each sought to mitigate this effect by means of one of two main arguments. First, some argued, restoration of citizenship does not necessarily entail the elimination of rights grounded in personhood, but can serve instead to supplement them.<sup>22</sup> This is, effectively, an argument that constitutional rights doctrine can hereafter proceed on a double track, with the law of personhood not displaced, but augmented, by the law of citizenship. Philip Kurland, for example, wrote of the possible revival of the Privileges or

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It is possible that for some the [Privileges or Immunities] clause was deemed inhospitable because by its language it confined its protection to citizens, while the equal protection clause and the due process clause afford sanctuary for all persons, including corporations, which the Supreme Court had specifically held to be outside the ambit of the privileges or immunities clause.

*Id.*

<sup>21</sup> See Linda S. Bosniak, *The Citizenship of Aliens*, SOCIAL TEXT, Fall 1998, at 29; Bosniak, *supra* note 17. Gerald L. Neuman expressed similar concerns in response to Judith Shklar's work on rights and American citizenship. See Gerald L. Neuman, *Rhetorical Slavery, Rhetorical Citizenship*, 90 MICH. L. REV. 1276, 1283-90 (1992) (reviewing JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION (1991)).

<sup>22</sup> In his dissent in *Saenz*, Justice Thomas argues that before reinvoking the Privileges or Immunities Clause as the basis for constitutional decision, the Court must, among other things, "consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting).



Immunities Clause: “there the clause is, an empty and unused vessel which affords the Court full opportunity to determine its contents without even the need for pouring out the precedents that already clog the due process and equal protection clauses.”<sup>23</sup> And indeed, he and others have argued that the precedents on alienage discrimination under the Equal Protection Clause could presumably be invoked to diminish most differences in the treatment of aliens that might result from reliance on citizenship-related provisions as a source of rights.<sup>24</sup>

A second mitigating argument found in the literature—though it has been in most cases more a suggestion than an elaborated argument—is that a return to constitutional citizenship as the basis for individual rights is not, in fact, inherently exclusionary toward aliens. Rather, the suggestion is that aliens can be incorporated into the turn to constitutional citizenship along with everybody else. Ely proposes a textual argument to this effect: instead of concluding that “the privileges or immunities of citizens”<sup>25</sup> are available only to citizens, he maintains that “one may plausibly read the Privileges or Immunities Clause [to provide] that there is a set of entitlements, ‘the privileges and immunities of citizens of the United States,’ which states are not to deny to anyone [including aliens]. In other words, the reference to citizens may define the class of rights rather than limit the class of beneficiaries.”<sup>26</sup>

Similarly, though in a broader vein, Phillip Bobbit suggests that reconceptualizing constitutional rights as flowing from a structural principle of

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<sup>23</sup> Kurland, *supra* note 9, at 420.

<sup>24</sup> See, e.g., Kurland, *supra* note 9, at 419 (“The equal protection clause has already required that classifications be rationalized so that differences in treatment between aliens and citizens would have to be particularly justified.”). Tribe makes a similar argument: grounding new rights in the Privileges or Immunities or Citizenship Clauses would seem, he acknowledges, to leave aliens behind. Yet “by prohibiting discrimination in legal rights among all *persons*—citizens and aliens alike—[the Equal Protection Clause could], in effect . . . secure the ‘privileges or immunities of citizens of the United States’ to all *persons* within the jurisdiction of a particular state.” TRIBE, *supra* note 18, at 1325. Under this approach, the Equal Protection Clause would be used to piggyback onto the Privileges or Immunities Clause to accomplish for aliens indirectly what cannot (by dint of text) be done directly. In the end, however, Tribe concludes that Equal Protection would not require perfectly identical treatment of citizens and aliens. “With respect to entitlement to at least some of the privileges or immunities of national citizenship, aliens and citizens may simply not be similarly situated,” he writes. *Id.*

Of course, this supplementarity strategy raises various questions about exactly how rights would be divided up under a citizenship-centered rights regime: which rights would remain personhood rights and which would end up as rights of citizenship? If this approach left most of the rights enjoyed by aliens intact, it would seem to do little toward rationalizing our existing due process and equal protection based fundamental rights doctrine, the pursuit of which has been a prime motivator for citizenship revivalists in the first place.

<sup>25</sup> The Fourteenth Amendment provides in part: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. CONST. amend. XIV, §1.

<sup>26</sup> ELY, *supra* note 19.

citizenship (such as that proposed by Charles Black) need not be read as inherently exclusionary toward aliens. Bobbit specifically rejects the view that there exists an “antinomy between citizen and alien”; he instead proposes that “for constitutional purposes,” the alien “be analogized to the citizen, with only such exceptions—voting and office-holding—as the Constitution itself provides.”<sup>27</sup>

Crucially, neither Ely nor Bobbit maintain that aliens can escape marginalization under a revived citizenship regime by *becoming* citizens via naturalization. Rather, their argument is that aliens, while they are aliens—*qua* aliens—can be said to enjoy citizenship, or should not be precluded from enjoying citizenship, in at least some respects.

It is this second effort to ameliorate constitutional citizenship’s alienage problem that interests me in this paper. The notion that a return to constitutional citizenship as the central foundation for rights need not leave aliens behind is quite fascinating. It leads to the apparently paradoxical idea that aliens can enjoy, or partake in, some aspects of citizenship. It points to the prospect, in other words, of “alien citizenship”<sup>28</sup> under our constitution.

At first glance, the notion of alien citizenship may seem impossible—baldly contradictory by its terms.<sup>29</sup> Yet it has not seemed so to all observers. And the fact that this idea has *not* seemed impossible—including to several of constitutional law

<sup>27</sup> PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 89 (1982); *see also* Note, *Membership Has Its Privileges and Immunities: Congressional Power to Define and Enforce the Rights of National Citizenship*, 102 HARV. L. REV. 1925, 1931 n.43 (1989).

[Understanding citizenship] as a binding relationship between the individual and the political community, under which the polity is obligated to guard and respect certain fundamental rights of the individual . . . does not necessarily exclude aliens from the protection of these same fundamental rights. Aliens have generally been extended the same individual guarantees as those enjoyed by persons who have achieved the legal status of citizenship.

*Id.*

<sup>28</sup> *See* Karst, *supra* note 6, at 25 (describing alien rights cases of the 1970s as “promot[ing] the principle of equal citizenship”).

<sup>29</sup> For earlier articulations of the notion of the “citizenship of aliens,” *see* Bosniak, *supra* note 21, at 29–35; Bosniak, *supra* note 17; *see also* Rut Rubio Marin, *National Limits to Democratic Citizenship*, 11 *RATIO JURIS* 51, 54–55 (1998) (urging recognition of the “democratic citizenship” of resident aliens); Virginie Guiraudon, *Citizenship Rights for Non-citizens: France, Germany and the Netherlands*, in *CHALLENGE TO THE NATION-STATE: IMMIGRATION IN WESTERN EUROPE AND THE UNITED STATES* 272 (Christian Joppke ed., 1998) (describing civil, social and political rights enjoyed by aliens as “citizenship rights”).

The concept of “alien citizenship” may resemble the sort of Zen Buddhist Koan Charles Black refers to in describing the apparently paradoxical notion of “substantive due process.” BLACK, *supra* note 5. In a more postmodern vein, we might characterize “alien citizenship” as a “performative contradiction.” *See* Bosniak, *supra* note 17, at 981 (quoting Judith Butler, *Sovereign Performatives in the Contemporary Scene of Utterance*, 23 *CRITICAL INQUIRY* 350, 366–67 (1997)).

scholarship's most eminent commentators—is itself quite striking. These scholars' conviction that a (re)turn to citizenship as a basis for constitutional rights need not imply the exclusion of aliens—and indeed might well bring them along—raises intriguing and important questions about the nature of our understandings of constitutional citizenship in broader terms.

In Part II of this article, I address the following question: in order for us to hold that grounding rights in constitutional citizenship would not necessarily entail a loss of rights to aliens—in order to assume that rights based in citizenship might well extend to aliens—what sort of conception of citizenship must we maintain? The answer, it seems to me, is that our conception of citizenship must be a divided one. It must be a conception that approaches citizenship status and citizenship rights as analytically distinct facets of citizenship which are not always in alignment. Such a conception, I will argue, is already common to us by way of the idea of “second-class citizenship.” The second-class citizen is one who is a formal subject of citizenship—a status citizen—but who is nevertheless denied full enjoyment of citizenship's substance, including rights associated with citizenship. The construct of alien citizenship is precisely the converse; it presupposes that those lacking the formal status of citizenship nevertheless enjoy rights commonly associated with citizenship.

To an important extent, this characterization seems to conform to our current constitutional practice: status noncitizens in the United States today enjoy a substantial range of rights of a kind which many commentators have sought to characterize in the language of citizenship. Yet assuming we do want to characterize rights as a kind of citizenship,<sup>30</sup> the question remains whether the idea of alien citizenship is normatively defensible, and whether it is even coherent when considered in light of citizenship's own substantive values and commitments. On the normative question, I argue that in light of our constitutional tradition's commitment to rights for persons, alien citizenship cannot be described as morally unjust in the way that second-class citizenship is.

I also contend in Part III, however, that the idea of citizenship as rights is itself beset by normative tensions which make the notion of alien citizenship fundamentally unstable. For while the idea of constitutional citizenship—equal citizenship—is characterized by a powerful commitment to universality, and as such supports a regime of rights based on personhood, constitutional citizenship also embodies an exclusive, nationalist political vision. These two commitments are usually seen as

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<sup>30</sup> Citizenship has long been associated with the enjoyment of rights. In social theory, the approach is most closely linked with the work of T.H. Marshall. See T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (1949). But citizenship-as-rights represents only one among several conventional understandings of citizenship. Scholars have distinguished among several understandings or, alternatively, “dimensions” of citizenship, though their formulations vary. Virtually all distinguish between rights-based and republican conceptions, and others stress cultural and legal understandings as well. An important essay is Kymlicka & Norman, *supra* note 2. For further discussion on the multiple understandings of citizenship, see Bosniak, *supra* note 2.

relevant to different spheres: citizenship's ethic of universality is presumed to pertain to relations among members of the community, while its nationalism is regarded as relevant to the community's borders. Yet the category of alienage brings these two commitments into tension with one another. Although the lives of aliens are significantly shaped by reference to citizenship's universalist commitments, citizenship's nationalism also fundamentally structures their status and experience.

I therefore conclude that the suggestion by Ely, Bobbit, and other scholars that aliens can be the subjects of citizenship, and that reviving constitutional citizenship need not result in a diminution of rights for aliens, is quite plausible, but only to a point. Aliens may enjoy substantive citizenship as constitutional persons, but they remain national outsiders in important respects as well. In the end, alien citizenship is necessarily a partial or incomplete citizenship.

Although in Part III, I enter the fray to some extent over the proper place of noncitizens in the constitutional order, this essay is fundamentally conceptual in nature. My principle concern is to show that our understandings of constitutional citizenship are segmented and divided in nature. They are divided analytically as between citizenship as status and citizenship as rights, and they are divided normatively; the constitutional ideal of equal citizenship contains both universalist and nationalist commitments.

My emphasis here on citizenship as a divided construct bears affinity with other recent work on the nature and history of citizenship in the United States. Constitutional historians, for example, have pointed out that the rights that comprise the enjoyment of citizenship in this country have never been cut from a single cloth, but entail a range of entirely distinguishable sorts of entitlements and protections.<sup>31</sup> This work, which focuses on the distinctions between civil, political, social, and (more recently) economic conceptions and practices of citizenship, is useful not merely because it allows us to think about the enjoyment of, and the exclusion from, citizenship in more complex terms than we are usually accustomed to doing, but also because it raises the possibility that citizenship is not an all-or-nothing affair but, rather, a construct which is internally complex and segmented. Nancy Cott's work

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<sup>31</sup> In the nineteenth century, American political thought distinguished between natural rights, civil rights, political rights, and social rights. See Nancy F. Cott, *Marriage and Women's Citizenship in the United States, 1830–1934*, 103 AM. HISTORICAL REV. 1440, 1448–49 (1998); Earl Maltz, *Reconstruction Without Revolution: Republican Civil Rights Theory in the Era of the Fourteenth Amendment*, 24 HOUS. L. REV. 221 (1987); Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241 (1998). Citizenship was associated with only the first two of these. Political rights became integral to our conception of citizenship only over the course of the twentieth century. A number of scholars have recently urged expansion of the class of rights associated with citizenship still further by advocating recognition of what some have termed "economic citizenship." See, e.g., Forbath, *supra* note 16; Karst, *supra* note 16; ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH CENTURY AMERICA (2001).

makes this kind of approach especially clear.<sup>32</sup> In an article on the history of women's citizenship in the United States, she shows that while white women in nineteenth century America enjoyed citizenship in "nominal" or "minimal" terms, they were nevertheless denied many of the rights we now consider fundamental to citizenship in its fullest sense.<sup>33</sup> In the course of the study, she observes that "citizenship can be delivered in different degrees of permanence or strength. . . . Citizenship is not a definitive either/or proposition—you are or you are not—but a compromisable one."<sup>34</sup>

Cott's notion of divisible, compromisable citizenship is highly relevant here. The status of aliens underlines the fragmented quality of citizenship as we conventionally understand it. This is a fragmentation that produces diverse sorts of partial citizenship identities, including the anomalous identity of the alien citizen. What is distinctive about the case of alienage is that it introduces into the mix an aspect of citizenship that most constitutional theorists who focus on rights tend to ignore—citizenship as formal national membership status. It is the uneasy relationship between citizenship rights and citizenship status, as well as between the universalist and particularist commitments embodied in the idea of citizenship as rights itself, that I address in the current paper.

## II. CITIZENSHIP'S SUBJECTS AND CITIZENSHIP'S SUBSTANCE

Interpreters of the Constitution have long been uncertain about precisely what the Fourteenth Amendment has to say about citizenship. Everyone, of course, acknowledges that passage of the Amendment radically altered American constitutional understandings of citizenship. We recognize, first of all, that the Amendment made citizenship a matter of national law and national concern. Whereas prior to its passage, the meaning and regulation of citizenship were understood to be matters reserved to the states, the new Amendment "decisively repudiate[d] state sovereignty"<sup>35</sup> and signaled a fundamental realignment of the relationship between the state and federal governments.

Everyone, furthermore, recognizes that the Amendment's Citizenship Clause served to reverse the Supreme Court decision in *Dred Scott*, which held that persons of African descent did not and could not possess citizenship.<sup>36</sup> In so doing, the Amendment provided "a definition of citizenship in which race played no part."<sup>37</sup> Most commentators read the Fourteenth Amendment as defining the criteria for

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<sup>32</sup> Cott, *supra* note 31.

<sup>33</sup> *Id.* at 1448.

<sup>34</sup> *Id.* at 1441–42.

<sup>35</sup> Christopher Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47, 71 (1995) ("[The clause's] declaration of citizenship decisively repudiates state sovereignty.").

<sup>36</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

<sup>37</sup> Bickel, *supra* note 1, at 374.

citizenship in more general terms as well;<sup>38</sup> the Amendment “tells us who are citizens of the United States,”<sup>39</sup> thereby designating the class of formal members of the nation.<sup>40</sup>

Yet while most commentators agree on these fundamentals, there looms beyond them a host of uncertainties about the Fourteenth Amendment’s vision of, and mandate concerning, citizenship. In recent years, divisions around these questions have mostly found expression in two broad debates.

The first debate concerns the question of citizenship’s substantive meaning and scope. While scholars increasingly concur that constitutional citizenship has been wrongfully neglected, if not repressed, for too long, the literature is replete with heated exchanges over precisely what effect the return to citizenship would or will have on constitutional jurisprudence—on the constitutional jurisprudence of rights, especially. Scholars have debated, among other things, whether the Privileges or Immunities Clause, the Citizenship Clause, or both should be read to incorporate the federal Bill of Rights or a much narrower set of rights;<sup>41</sup> whether the protections of citizenship are confined to antidiscrimination guarantees or embody protection of those fundamental rights now guaranteed under substantive due process theory—and

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<sup>38</sup> See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1872) (describing the first sentence of the first Clause of the Fourteenth Amendment as providing “a definition of citizenship”).

<sup>39</sup> MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 191 (1999); see also Eisgruber, *supra* note 35, at 78 (arguing that the Fourteenth Amendment “articulat[es] citizen identity”).

<sup>40</sup> The Citizenship Clause declares as citizens all persons born or naturalized in the United States. Congress possesses naturalization power under Article I, Section 8, pursuant to which it may define the criteria for accession to citizenship after birth. It is, therefore, the Citizenship Clause, together with the naturalization decisions which Congress may make pursuant to the naturalization power, that defines the class of citizens.

While there have been disputes over the years about the precise contours of the class of Fourteenth Amendment citizens—the most recent concerning the status of U.S.-born children of undocumented immigrants—on the whole, the Amendment’s definition of the citizenship class is uncontroversial.

<sup>41</sup> For the pro-incorporation position, see, for example, Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193 (1992); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); and Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 *YALE L.J.* 643, 648 (2000) (arguing that “the Framers’ purpose of incorporating Bill of Rights freedoms through the Privileges or Immunities Clause may be accomplished without disturbing the *Slaughter-House* precedent”). For arguments urging a narrower, nonincorporationist interpretation of the Privileges or Immunities Clause, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 22, 31–32, 38 (1977); and Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 *STAN. L. REV.* 5 (1949).

perhaps other unenumerated rights as well;<sup>42</sup> and finally, whether the enjoyment of citizenship necessarily entails social and economic, as well as political and civil, rights for society's members.<sup>43</sup>

The second major debate on the subject is a debate over the significance of citizenship in our constitutional system. Alexander Bickel famously launched the modern version of this debate by espousing the view that possession of citizenship status has been, and should remain, fundamentally insignificant in the American constitutional order.<sup>44</sup> Many scholars have since attempted in a variety of ways to contest this view; some dispute the historical account,<sup>45</sup> and others have urged that

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<sup>42</sup> For arguments on behalf of an anti-discrimination reading of the Privileges or Immunities Clause, see, for example, John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1388 (1992) (providing an "equality-based reading" of the Privileges or Immunities Clause, and concluding that "the main point of the clause is to require that every state give the same privileges and immunities of state citizenship . . . to all of its citizens"); Graglia, *supra* note 7 (arguing that the Privileges or Immunities Clause, like the Due Process and Equal Protection Clauses, was meant to ensure the protection of civil rights for blacks); BERGER, *supra* note 41, at 20–36. For opposing views, see ELY, *supra* note 19, at 24 ("[I]t is no small problem for the [anti-discrimination] interpretation of the Privileges or Immunities Clause that it would render the Equal Protection Clause superfluous . . . [The Clause] seems to announce rather plainly that there is a set of entitlements that no state is to take away."); Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the Slaughter-House Cases Without Exhuming Lochner: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1 (1996) (reading the Privileges or Immunities Clause to prohibit states from abridging a body of preexisting national rights); Note, *supra* note 27, at 1937 (suggesting a reading of "citizenship" as providing certain "nontextual guarantees" to members of the political community); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 104 (1993).

<sup>43</sup> The debate is, in part, historical. Some scholars have argued the rights the framers sought to guarantee by way of the Privileges or Immunities Clause were only civil, and not social or political rights. See, e.g., Earl M. Maltz, *Citizenship and the Constitution: A History and Critique of the Supreme Court's Alienage Jurisprudence*, 28 ARIZ. ST. L.J. 1135, 1190 (1996); Rosen, *supra* note 31, at 1245 (describing the Framers' "broader purpose . . . to extend civil rights (or privileges and immunities of citizenship), but not political or social rights, to all citizens, black and white, on equal terms"); see also Daniel J. Levin, *Reading the Privileges or Immunities Clause: Textual Irony, Analytical Revisionism, and an Interpretive Truce*, 35 HARV. C.R.-C.L. L. REV. 569, 571 (2000) (arguing that "the normative content of the 'privileges or immunities of citizens of the United States' is embedded in conceptions of structural participation of self-government rather than in more general notions of personal liberty") (citation omitted).

In contrast to these readings, a number of scholars have argued recently that the rights of citizenship should be understood, on historical and normative grounds, to entail economic rights. See, e.g., William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting The Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771 (1994); Karst, *supra* note 16; Bruce Ackerman & Anne Alstott, *Your Stake In America*, 41 ARIZ. L. REV. 249 (1999).

<sup>44</sup> Bickel, *supra* note 1.

<sup>45</sup> See, e.g., Maltz, *supra* note 43, at 1190 ("The text, structure and history of the Constitution reflect a keen appreciation of the importance of the political relationships inherent in both state and

the status of citizenship has, in any event, wrongly been “devalued” and deserves constitutional prominence and honor.<sup>46</sup> Others, however, continue to characterize the Constitution as centrally committed to the rights of persons, and to normatively defend such a commitment.

On the face of it, these two debates are intimately related. At the most obvious level, it will only be worthwhile to engage in protracted debates about the meaning of citizenship to the extent that we regard citizenship as legally and politically significant. Yet they are also distinguishable in ways that are conceptually important. For one thing, the precise object of their concern—the “citizenship” which they address—is not identical in each case. Those engaged in the debate over the meaning of citizenship treat citizenship as an ensemble of rights (and sometimes, responsibilities) enjoyed by community members whose nature and scope require specification. Those involved in the “significance of citizenship” debate, in contrast, approach citizenship as a formal legal status and ask what that status means, and what it ought to mean, in our constitutional system. The two debates also have radically different starting points with respect to the class of persons deemed to constitute citizenship’s subjects. Those engaged in the “meaning of citizenship” debate presume at the outset that everyone in the community enjoys the formal status of citizenship, and instead focus on the nature and distribution of the substantive rights to which these citizens are entitled. In contrast, those addressing “the significance of citizenship” begin by assuming that *not* everyone is a formal citizen, and then go on to examine the implications of possessing, or not possessing, citizenship status.

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national citizenship, as well as the potential relevance of those relationships to the allocation of a wide variety of rights and benefits.”).

<sup>46</sup> See Peter H. Schuck, *The Devaluation of American Citizenship*, 3 GEO. IMMIGR. L.J. 1, 13 (1989).

[T]he distinctive meaning of American citizenship . . . has been transformed in recent decades by a public philosophy that . . . [has] reduced almost to the vanishing point the marginal value of citizenship as compared to resident alien status. . . . Not only do aliens need or want [it] less; many of those who *do* want it for their children need expend remarkably little in order to get it.

*Id.* (emphasis added); see also Eskridge, *supra* note 15.

Justice Rehnquist has penned what is probably the most pointed judicial articulation of this position:

[T]he Constitution itself recognizes a basic difference between citizens and aliens. That distinction is constitutionally important in no less than 11 instances in a political document noted for its brevity . . . . In constitutionally defining who is a citizen of the United States, Congress obviously thought it was doing something and something important. Citizenship meant something, a status in and relationship with a society which is continuing and more basic than mere presence or residence.

*Sugarman v. Dougall*, 413 U.S. 634, 651–52 (1973) (Rehnquist, J., dissenting).



These differences in base line and focus set the debates apart from one another in conceptual terms, but the distinctions are not merely conceptual. As it happens, something of a professional divide has developed between those engaged in the two citizenship debates as well. Whereas the “meaning of citizenship” debate is central fare in mainstream constitutional theory concerning both rights and democratic self-governance, the “significance of citizenship” issue has been of special interest to immigration scholars and those concerned with the status of aliens. Only rarely do scholars involved in one of these debates cross the line to engage with the other.

This seems to me to be an unfortunate divide. For while the two debates do indeed address different sorts of questions, these are questions which inevitably bear very closely on one another. It comes down to this: we cannot think productively about constitutional citizenship in substantive terms without addressing the question of citizenship’s formal subjects as well. We cannot address constitutional citizenship conceived as rights without being likewise mindful of the allocation and effect of national citizenship status—or so I will argue.

But the question remains as to precisely *how* rights and status bear on one another. What exactly is the nature of the relationship between citizenship’s subjects and citizenship’s substance, between the “who” and the “what” of constitutional citizenship? This relationship has been extremely complex and uncertain in constitutional thought. For one thing, it is not always clear on the face of it which of these aspects of citizenship commentators are addressing in any given context. The two are often conflated, and they can often be hard to distinguish in any event.<sup>47</sup> At the same time, because constitutional law and commentary on citizenship often treat substance and subjects as distinct legal concerns which employ distinct analytic and even normative vocabularies, the relationship between them is rarely directly considered.

One of the most productive ways, it seems to me, to address the difficult interplay between citizenship’s substance and citizenship’s subjects in constitutional law is to examine it in relation to the constitutional status of aliens. At first glance, alienage might seem to be a subject wholly encompassed within the “significance of citizenship” debate, for inquiring about the legal and social differences that citizenship status makes necessarily entails an inquiry about the difference that alienage makes as well.<sup>48</sup> But alienage, as it happens, is also significantly implicated by the “meaning of citizenship” debate. This is because imbuing the idea of citizenship with greater constitutional meaning—characterizing increasing numbers of rights and responsibilities in the idiom of citizenship—presents the possibility that aliens will be excluded from the scope of many of the Constitution’s protections altogether.

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<sup>47</sup> See, e.g., ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 2* (1997) (describing laws pertaining to acquisition and loss of citizenship status and laws pertaining to general rights of residents as “citizenship laws”).

<sup>48</sup> Cf. Bosniak, *Difference That Alienage Makes*, *supra* note 14.

While this risk is most often ignored in the literature, we have seen that some constitutional commentators have recognized it as a real possibility, and have expressed concern that linking rights to citizenship will cut against enjoyment of rights by those persons lacking citizenship by legal definition.<sup>49</sup> A few other commentators, in contrast, have sought to argue that exclusion of aliens is not a strictly necessary outcome of the revival of constitutional citizenship. They have done so by positing, as Philip Bobbit writes, that there is no necessary “antinomy between citizen and alien,”<sup>50</sup> and by suggesting that aliens might themselves enjoy some aspects of constitutional citizenship.<sup>51</sup>

What is significant about such a proposal is that it implicitly relies upon a conception of citizenship in which citizenship’s subjects and citizenship’s substance are not necessarily coextensive but are relatively autonomous from each other. This is a conception in which a person need not *be* a citizen in order to *enjoy* citizenship. It is the soundness and the implications of this premise with which I am concerned here.

### A. *Citizenship Minimalism and Its Critics*

The Fourteenth Amendment tells us who the nation’s citizens are. Yet beyond designating the class of national citizens, what more about citizenship does the Fourteenth Amendment have to say? One reading, which has long dominated our jurisprudence and constitutional thought, is that it says very little else. In this minimalist reading,<sup>52</sup> the effect of the Amendment’s Citizenship Clause is almost entirely definitional.<sup>53</sup> The clause designates a class of national citizens who owe allegiance to the polity and are in turn guaranteed its protection in the international sphere.<sup>54</sup> And while the Amendment contains the Privileges or Immunities Clause as well, the longtime interpretation of this clause by the Supreme Court has regarded it as guaranteeing very little by way of substance to those defined as Fourteenth Amendment citizens. As is well known, in an 1873 decision not yet overruled, a majority of the Court held that the privileges or immunities guaranteed in the Amendment’s first clause guaranteed virtually nothing beyond a set of minimal rights

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<sup>49</sup> See *supra* text accompanying notes 11–21.

<sup>50</sup> BOBBITT, *supra* note 27, at 88.

<sup>51</sup> See *supra* text accompanying notes 25–28.

<sup>52</sup> ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 51 (1975) (describing the “traditional minimal content of the concept of citizenship”).

<sup>53</sup> This characterization seems questionable: describing the clause as “defining citizenship” suggests that it provides a definition of what citizenship substantively entails. As Douglas Smith has written, the clause is better viewed as “defin[ing] the conditions sufficient for attaining the status of ‘citizen.’” Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 *SAN DIEGO L. REV.* 681, 693 (1997).

<sup>54</sup> *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 166 (1875).

already guaranteed or implicit elsewhere in the Constitution.<sup>55</sup> Until fairly recently, most scholars have taken largely for granted both the *Slaughter-House* Court's evisceration of the clause and the development of the jurisprudence of individual rights under the aegis of personhood by way of the Equal Protection and Due Process Clauses.<sup>56</sup>

On this traditional account, then, the Fourteenth Amendment does no more than specify who is a citizen, and offers an exceptionally thin conception of what citizenship is. Citizenship, in this understanding, is "membership of a nation,"<sup>57</sup> and not a great deal more.<sup>58</sup> As Bickel put it: "[w]hile we now have a definition of citizenship in the Constitution, we . . . set very little store by it."<sup>59</sup>

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<sup>55</sup> The Supreme Court's recent decision in *Saenz v. Roe*, 526 U.S. 489 (1999), has been characterized by some scholars as representing a major step toward an unravelling of *The Slaughter-House Cases*. See authorities cited in note 35, *supra*. Determining whether this reading of the *Saenz* is overly optimistic will have to await the further decisions from the Court.

<sup>56</sup> For arguments that *The Slaughter-House Cases* badly distorted constitutional rights doctrine by, in effect, forcing the Equal Protection and Due Process Clauses to bear the weight for which they were, and are, ill-equipped, see, for example, TRIBE, *supra* note 18, at 1317 (noting that for many constitutional scholars, "the problems [associated with] the textual gymnastics arguably necessary to find protection of *substantive* rights in a provision whose words seem most apparently concerned with *process*—have become insuperable"); Kurland, *supra* note 9, at 406 ("[O]nly the [P]rivileges or [I]mmunities [C]lause speaks to matters of substance; certainly the language of due process and equal protection does not."); and ELY, *supra* note 19, at 18, 22–30 (arguing "that 'substantive due process' is a contradiction in terms—sort of like 'green pastel redness'" and urging new attention to the Privileges or Immunities Clause as a source of substantive rights).

For a contrary view on the effect of the *The Slaughter-House Cases*, see Walter Dellinger, *Remarks on Jeffrey Rosen's Paper*, 66 GEO. WASH. L. REV. 1293, 1293 (1998).

Although *Slaughter-House* was wrong, I have never agreed with the many scholars who believe that its fundamental error was that it eliminated the correct clause for the national protection of individual rights (the Privileges and Immunities Clause) thereby 'forcing' later interpreters to rely upon the wrong clause (the Liberty/Due Process Clause) . . . Having the Due Process Clause do the work intended for the Privileges and Immunities Clause may be awkward, but it is not a constitutional tragedy.

*Id.*; see also Rosen, *supra* note 31, at 1242–43 (arguing that "the new conventional wisdom about the virtues of resurrecting the Privileges or Immunities Clause is wrong . . . . Overruling *Slaughter-House* would solve so few of the problems in modern Fourteenth Amendment jurisprudence that it's not clear that a textualist revival would be worth the trouble").

<sup>57</sup> *Minor*, 88 U.S. (21 Wall.) at 165–66.

<sup>58</sup> As the Court in *Slaughter-House* described, the reach of the Privileges or Immunities Clause imparts only rights of national citizenship, which confers upon the individual the right "'to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions' . . . [to] free access to its seaports . . . to the subtreasuries, land offices, and courts of justice in the several States.' . . . [and] to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the

Against this minimalist reading, contemporary scholars urging the revival of the idea of constitutional citizenship have protested that the Fourteenth Amendment has much more to say about citizenship than this account acknowledges. Specifically, they argue that beyond defining the class of citizenship's subjects, the idea of citizenship carries with it substantive rights which are far more elaborate and robust than the minimalist reading allows. Some would locate these in the Citizenship Clause itself; they argue that implicit in the constitutional definition of citizenship's subjects is a commitment to provide fundamental rights to citizens.<sup>60</sup> Others maintain that the Framers entrusted citizenship's substance to the Privileges and Immunities Clause,<sup>61</sup> while others still read a commitment to substantive citizenship values in the equal protection clause by way of the principle of equal citizenship.<sup>62</sup> Some would

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jurisdiction of a foreign government." 83 U.S. (16 Wall.) 36, 79 (1872) (quoting *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867)).

<sup>59</sup> Bickel, *supra* note 1, at 378.

<sup>60</sup> See, e.g., BLACK, *supra* note 5, at 33–66; Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281 (2000); Jennifer S. Hendricks, *Women and the Promise of Equal Citizenship*, 8 TEX. J. WOMEN & L. 51 (1998); Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387, 395 (1967).

[T]he national citizenship bestowed upon the Negro by the first sentence of the Fourteenth Amendment contained as an essential attribute of this new status the right to be free from the stigma of inferiority implicit in the institution of slavery, the right to be free from discrimination by reason of race in the exercise of rights or privileges generally available to white citizens.

*Id.*; see also Smith, *supra* note 53, at 690 (arguing that “[t]he Citizenship Clause of Section 1 may be interpreted to represent a guarantee binding upon both the state and federal governments of certain fundamental rights inherent in the concept of citizenship as understood at the time of ratification of the Amendment”); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 912–13 (1986) (“Understood within the context of the Declaration of Independence, natural rights theory, and nationalist constitutionalism, the Citizenship [C]ause of the [F]ourteenth [A]mendment delegated the constitutional authority to secure affirmatively the fundamental rights of American citizens.”); Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 DUKE L.J. 1, 45 (1993) (suggesting that Section 5 of the Fourteenth Amendment grants Congress the power to enforce the Citizenship Clause and ensure “the benefits government ought to provide to a free people—such as liberty, security and justice”); William Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183 (2000) (urging that the Due Process and Equal Protection Clauses “be read as guarantees fulfilling the promise of citizenship made in the first sentence of the Fourteenth Amendment”); Tribe, *supra* note 3, at 126–27 (describing the citizenship clause as “an underutilized constitutional provision if ever there was one”).

<sup>61</sup> As John Ely writes, “it was probably the clause from which the framers of the Fourteenth Amendment expected most.” ELY, *supra* note 19, at 22.

<sup>62</sup> Karst, *supra* note 6, at 4 (describing citizenship principle as giving “substantive content [to] the [E]qual [P]rotection clause”).

confine the rights of citizenship to civil and/or political rights, while others insist that constitutional citizenship entails commitments to economic and social equality as well.<sup>63</sup>

In each case, though, revivalists want to press beyond the minimalist reading of Fourteenth Amendment citizenship in two respects. First, they maintain that the Fourteenth Amendment should be read not merely to designate citizenship's subjects but also to provide substantive guarantees associated with citizenship. Second, they contend that these guarantees are thicker and more meaningful than the traditional minimalist account allows.

As to why constitutional citizenship should be understood more thickly and substantively, scholars' rationales have varied. Some analysts regard the minimalist account as simply mistaken as an historical matter; in their view, citizenship minimalism ignores the intent of the Framers and the original meaning of the Fourteenth Amendment.<sup>64</sup> Others contend that, beyond history and text, citizenship minimalism obscures the meaning of the Constitution in a deeper sense. Whether animated by an anti-caste vision of the Constitution or by principles of republican self-government,<sup>65</sup> the ideal of citizenship is understood to represent a core source of rights and responsibilities in our constitutional nomos.

I have some sympathy with the view, espoused by critics of citizenship minimalism, that the idea of constitutional citizenship should be read to possess a

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<sup>63</sup> For arguments that the Fourteenth Amendment's protection of citizenship rights pertained only to civil rights, see Maltz, *supra* note 43. *But see* Harris, *supra* note 9 (for a discussion of citizenship as political rights). For arguments that citizenship has to be understood to include economic and social rights, see Forbath, *supra* note 16, and Karst, *supra* note 16 (discussing economic rights), and Balkin, *infra* note 66 (discussing social rights).

<sup>64</sup> There is by now a substantial literature on the historical origins and political context of the Fourteenth Amendment, and many scholars have concluded that the Framers affirmatively intended to imbue the concept of citizenship with real constitutional effect. *See, e.g.*, ELY, *supra* note 19; Harrison, *supra* note 42; Maltz, *supra* note 31; Maltz, *supra* note 43.

<sup>65</sup> Some characterize the Constitution as embodying an anti-caste ethic; in this view, the Fourteenth Amendment should be read as a response to the subordination of African-Americans—and by implication, to other oppressed groups as well. The concept of equal citizenship—understood as full and meaningful membership for all—figures centrally in this narrative. *See, for example*, Karst, *supra* note 6, at 17.

[The Framers] chose to cast the amendment in general terms, declining to use the language of specific rights and particular groups that they had used in the 1866 Act. It was this choice that gave the principle of equal citizenship its capacity to grow into a protection of other groups and other rights.

*Id.*; *see also, e.g.*, J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997). Others regard Constitutional citizenship as embodying commitments to democratic self-government and republican virtue. *See, e.g.*, Linda McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 CHI.-KENT L. REV. 301 (2000); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

meaning that goes beyond providing for the sheer delineation of national status. Notice, however, that to the extent we adopt a more robust reading of constitutional citizenship, we are presuming a dual conception of Fourteenth Amendment citizenship, under which the Amendment's provisions work *both* to designate the class of persons entitled to citizenship *and* to set out a substantive vision of citizenship rights. This conception may represent a more complete accounting of citizenship's meaning under the Constitution, but it introduces complexities as well. Specifically, it opens up a variety of analytical and normative questions concerning the nature of the relationship between status citizenship and rights citizenship in the first instance.

### B. "Mere Status" and "Equal Citizenship": The Second-Class Citizenship Critique

In discussions of citizenship in political and social theory, it is common for scholars to distinguish between "thin" and "thick" versions of citizenship. Thin citizenship is citizenship-as-status, "mere status" in the disparaging phrase of some commentators.<sup>66</sup> This thin version of citizenship is contrasted with more robust, substantive conceptions. Such conceptions vary in kind: some scholars focus on citizenship as the meaningful enjoyment of rights, while others, in a more civic republican vein, approach citizenship as a kind of democratic engagement and self-governance. In either case, however, a hierarchy is posited: to possess the legal status of citizenship is to enjoy citizenship only in the most formal and nominal sense. The true and full enjoyment of citizenship requires much more.<sup>67</sup>

In the constitutional literature, some accounts of the relationship between citizenship status and citizenship rights employ a similar hierarchical framework, with rights the superior, and status the inferior, term. The work of Kenneth Karst is especially illustrative. Karst describes the Fourteenth Amendment as containing two conceptions of citizenship: a "narrow" conception, pursuant to which citizenship constitutes legal status, and a "broader conception" which embodies, in his argument,

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<sup>66</sup> See, e.g., Chantal Mouffe, *Democratic Citizenship and the Political Community*, in DIMENSIONS OF RADICAL DEMOCRACY: PLURALISM, CITIZENSHIP, COMMUNITY 225, 227 (Chantal Mouffe ed., 1992) (arguing that "liberalism . . . reduced citizenship to a mere legal status"); Sanford Levinson, *National Loyalty, Communalism, and the Professional Identity of Lawyers*, 7 YALE J.L. & HUM. 49, 53-54 (1995) (distinguishing between the concepts of "good citizens" and "mere citizens").

<sup>67</sup> For a useful, and elaborate, characterization of "thin" and "thick" conceptions of citizenship, see Rainer Baubock, *Differentiating Citizenship*, in INCLUSION/EXCLUSION (Alison Woodward ed., forthcoming). In contrast to the account here, however, Baubock characterizes as "thin" not merely conceptions of citizenship-as-status but also conceptions of citizenship-as-rights which do not entail corresponding obligations or cultural commitments. *Id.* at 5-7. He propounds a conception of "thick" citizenship that is far more communitarian and nationalistic than the one I am describing here.

nationality laws—which, among other things, denationalized American women who married foreigners—makes the point vividly.<sup>77</sup> So too does the growing literature on the exclusion of Puerto Ricans from constitutional citizenship status.<sup>78</sup> Possession of the “mere status” of citizenship does not appear so trivial a matter when approached in the context of these struggles.<sup>79</sup> This account, furthermore, obscures the ways in which a *lack* of the status of citizenship itself—in the form of alienage—sometimes serves as a basis for caste-like treatment and discrimination.<sup>80</sup>

But beyond this insensitivity to the continuing significance and intractability of citizenship status questions, there lies another, more conceptual, difficulty with the second-class citizenship critique. I have said that commentators often treat citizenship status and citizenship rights as elements in a hierarchy, with status the lesser of the two values. Yet the hierarchy posited is usually not one of otherwise independent variables. Instead, the possession of citizenship status is often regarded as logically prior to—as a necessary but insufficient condition for—the enjoyment of citizenship rights. In this account, citizenship status is assumed to be an embryonic form of citizenship, an indispensable antecedent to citizenship in its more substantive mode.

However, conceiving of the relationship between status and rights this way can be misleading. Citizenship status is not, in fact, always an antecedent to citizenship rights. While citizenship status is a condition precedent for the enjoyment of some rights, there are many rights that many citizenship revivalists would want to characterize as rights of citizenship—expressive and associational rights, for instance, or procedural rights in the criminal context, or the right to attend public schools with other children—for which citizenship status is not a prerequisite at all. Such rights have been regarded, instead, as attaching to persons—territorially-present persons, often through the constitutional values of equal protection and due process.

And indeed, there is one particular right—that of voting—which today is very closely associated with citizenship both in popular understandings and in political theory,<sup>81</sup> and which, in recent decades, has been confined to people who possess

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<sup>77</sup> See IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 *YALE L.J.* 817 (2000); Cott, *supra* note 31; Leti Volpp, *Dependent Citizens and Marital Expatriates* (forthcoming).

<sup>78</sup> See generally FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001).

<sup>79</sup> In a recent essay, Karst recognizes this point. See Kenneth L. Karst, *Citizenship, Law, and the American Nation*, 7 *IND. J. GLOBAL LEGAL STUD.* 595, 596 (2000) (arguing that while Alexander Bickel considered the status of citizenship “a trifling matter, . . . to an African-American living under Jim Crow, or to many a resident alien today, the status was and is a prize to strive for . . . . The formal status of citizenship can seem trifling only when you are able to take it for granted.”).

<sup>80</sup> See generally, Bosniak, *supra* note 17.

<sup>81</sup> Voting has not always been regarded as a necessary incident of citizenship. See, e.g., *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1875); *Pope v. Williams*, 193 U.S. 621, 628 (1904)

citizenship status, which nevertheless was not limited to status citizens historically. As a number of scholars have chronicled in recent years, aliens possessed the right to vote in many states through the late nineteenth century, and even today, they vote in a handful of local elections.<sup>82</sup>

The point is that citizenship status does not always serve as the ground floor in the larger edifice of constitutional citizenship. Instead we find that just as citizenship status hasn't always entailed citizenship rights, the possession of rights doesn't always require prior possession of citizenship status. Rights and status, in short, are relatively autonomous.<sup>83</sup>

### *C. Alienage and the Citizenship Revival*

This relative autonomy as between citizenship status and citizenship rights goes a long way to explaining the suggestion of those constitutional scholars who have considered the alienage question that, notwithstanding potential deleterious effects on aliens, the revival of constitutional citizenship ultimately need not undercut aliens' rights. Aliens can enjoy much in the way of rights-citizenship, even if they lack status-citizenship by definition. Citizenship, in other words, is a divided condition.

It is this conception of a divided citizenship that enabled Charles Black to write that "filling with content the concept of citizenship need not result in neglect of the

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("Citizenship and suffrage are by no means inseparable; the latter is not one of the universal, fundamental, inalienable rights with which men are endowed by their Creator. . . ."); *see also* Cott, *supra* note 31.

<sup>82</sup> GERALD NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 63–71, 139–49 (1996); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977).

<sup>83</sup> The concept of "relative autonomy" has often been used to describe the nature of a relationship between social domains or phenomena in empirical terms; it is meant to convey the idea that two domains (or phenomena) are neither entirely reducible to one other, nor entirely independent. The term has its origins in Marxist thought, and was a key concept of Critical Legal Studies' accounts of law's relationship to other social fields. *See, e.g.*, Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 101 (1984). Today, legal scholars of many stripes rely on the idea to acknowledge both "the obvious influences running, in both directions, between law and other social spheres," and, at the same time, the fact that law must be treated "in its own terms, not the terms of some other field or discipline . . ." Hugh Baxter, *Autopoiesis and the "Relative Autonomy" of Law*, 19 CARDOZO L. REV. 1987, 1990 (1998).

My use of the term here is meant to convey not an empirical but a logical or conceptual relationship. My argument is simply that in conventional constitutional thought, rights-citizenship does not depend entirely on possession of status-citizenship, nor does enjoyment of status-citizenship entail, necessarily, enjoyment of citizenship rights. These dimensions of citizenship, in other words, are not collapsible one into the other; they are closely-related and partly overlapping, but substantially independent as well.



rights of aliens among us.”<sup>84</sup> Rather, Black argues the grounding of rights in citizenship should result in the further protection of aliens—“lawfully resident aliens,” he qualifies—“for their position is in many respects and for many purposes soundly to be analogized to that of citizens.”<sup>85</sup> Likewise, it is this sort of disjuncture between status and rights that John Ely invoked when he suggested that the Privileges or Immunities Clause need not be read to protect citizens only; instead, he maintains, it can plausibly be read to mean that “there is a set of entitlements, ‘the privileges and immunities of citizens of the United States,’ which states are not to deny to *anyone*,”<sup>86</sup> aliens included. The phrase “privileges or immunities of citizens,” he writes, “define[s] the class of rights rather than limit[s] the class of beneficiaries.”<sup>87</sup>

And it is with this conception of the relative autonomy of citizenship’s subjects and substance implicitly in mind that Philip Bobbit could criticize the assumption “that ‘alien’ and ‘citizen’ are opposites sharing no characteristics, defined as negations of one another.”<sup>88</sup> Bobbit would presumably concur that alien and citizen are, to some degree, opposing categories in the domain of formal citizenship status. After all, our immigration law defines the category “alien” precisely as “any person not a citizen” of the United States.<sup>89</sup> But with regard to substantive citizenship—understood here as rights—the relationship, he suggests, is far more subtle and complex.<sup>90</sup>

Kenneth Karst’s discussion of the alienage question in his early work is a notable example of constitutional theory employing a divided conception of citizenship. Karst is a longtime proponent of revitalizing the normative ideal of citizenship as a basis for

<sup>84</sup> Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 10 (1970).

<sup>85</sup> *Id.* at 10 n.38.

<sup>86</sup> ELY, *supra* note 19, at 25 (emphasis added). Ely recognizes that on its face, the clause’s language appears to “limit its protection to United States citizens.” *Id.* at 24–25. In response he writes:

I certainly agree that we should defer to clear constitutional language: for one thing it is the best possible evidence of purpose. But when the usual reading is out of accord with what we are quite certain was the purpose, we owe it to the Framers and ourselves at least to take a second look at the language . . . . Since everyone seems to agree that [the non-exclusionary] construction would better reflect what we know of the purpose, and since it is one the language will bear comfortably, it is hard to imagine why it shouldn’t be followed.

*Id.*

<sup>87</sup> *Id.*

<sup>88</sup> BOBBIT, *supra* note 27, at 89.

<sup>89</sup> 8 U.S.C. § 1101(a)(3) (1994) (“The term ‘alien’ means any person not a citizen or national of the United States.”).

<sup>90</sup> Bobbitt writes that the relationship between citizen and alien is not necessarily an “antinomy.” BOBBITT, *supra* note 27, at 88. It is, rather, “a chiaroscuro relationship,” one “which may be found in Aristotle but is not a relationship established anywhere in the Constitution.” *Id.*

constitutional rights, though unlike many other scholars, he has argued that the principle of equal citizenship is best housed, not in the Citizenship Clause or the Privileges or Immunities Clause, but in the Equal Protection Clause.<sup>91</sup> He acknowledges that this may seem counterintuitive; after all, he notes that it is the former clauses that expressly address the subject of citizenship.<sup>92</sup> Yet, Karst endorses the Equal Protection Clause as a textual foundation for equal citizenship for several reasons.

First, he notes that there is value and safety in precedent: “we already have a store of well-developed equal protection doctrine embodying the principle of equal citizenship. . . . It seems sensible to leave the principle where it took root.”<sup>93</sup> Moreover, he contends (contrary to the weight of more recent opinion on the matter) that the Equal Protection Clause “shows every sign of being able to bear the full meaning of the equal citizenship principle.”<sup>94</sup> There is, in other words, no intrinsic reason of doctrinal integrity or coherence to depart from our recent interpretive practice. However, for Karst, the most important reason for sticking with the Equal Protection Clause is that it extends its protection “not only to ‘citizens’ but to every ‘person.’”<sup>95</sup> This is, for him, a signal virtue. It is a virtue because it means the clause is maximally inclusive, as the equal citizenship principle ought to be. It is a virtue, in particular, precisely because the Equal Protection Clause does not confine its protections to citizens—and Karst maintains, “it is important to extend most of the content of the equal citizenship principle to aliens.”<sup>96</sup>

Now this is a very striking position: Karst urges retention of the Equal Protection Clause as the textual site of the equal citizenship principle precisely because the Equal Protection Clause does not limit its protective scope to citizens. Karst himself acknowledges the apparent paradox; on introducing the argument, he requests of his readers “the suspension of incredulity.”<sup>97</sup> He goes on to explain his view that, “for most purposes aliens are entitled to be regarded as respected participants in our national society, even though they lack citizenship in the narrow sense. The broader principle of equal citizenship extends its core values to noncitizens because for most purposes they are members of our society.”<sup>98</sup>

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<sup>91</sup> Karst, *supra* note 6, at 42–46.

<sup>92</sup> *Id.* at 42–44.

<sup>93</sup> *Id.* at 43–44.

<sup>94</sup> *Id.* at 43.

<sup>95</sup> *Id.* at 44.

<sup>96</sup> *Id.* at 44–45.

<sup>97</sup> Karst, *supra* note 6, at 44.

<sup>98</sup> *Id.* at 45. Karst suggests that noncitizens may rightly be denied political (though not other) rights: “[since] we are a political community, and aliens are members of other political communities, it may be permissible for a state to restrict political participation . . . .” *Id.* Of course, many citizens—increasing numbers of them—are members of other political communities as well, yet we do not disenfranchise them on this basis. For a useful recent overview of the subject of dual

Karst thus employs his preference for substantive over formal citizenship to urge inclusion of formal noncitizens within citizenship's substantive scope. Aliens' lack of the "narrow" citizenship of status does not require them to be denied the "broader" citizenship of membership because status-citizenship, in his formulation, is not a precondition for equal citizenship.

What each of these scholars shares in common is the conviction that locating the idea of citizenship at the center of the constitutional discourse of rights need not entail the wholesale exclusion of aliens. This conviction presupposes that citizenship is not a monolithic whole, but rather a compound and ultimately severable concept: citizenship's subjects and its substance—its "beneficiaries" and its "rights," in Ely's terms<sup>99</sup>—are treated as discontinuous. Just as being a citizen does not guarantee (although it should, all agree) any particular citizenship substance, enjoying citizenship does not require being a citizen in any formal sense.<sup>100</sup> In this understanding, citizenship status and citizenship rights are simply nonconvergent.

#### D. *The Prevailing View: Citizenship For Citizens*

The reading these scholars give to the status of alienage under an enhanced citizenship rights regime in constitutional law is not, to be sure, the prevailing understanding. Most scholars seem to take it for granted that the enjoyment of citizenship rights requires possession of citizenship status. This is made clear in many contemporary discussions of the revival of the constitutional concept of citizenship as a basis for rights. Scholars most often read the Privileges or Immunities Clause, for example, as ensuring citizenship rights only for people who possess citizenship status. As Michael Kent Curtis has written, "the rights possessed by virtue of the Privileges or Immunities Clause of the Fourteenth Amendment are held by those with the status of citizens of the United States."<sup>101</sup> This is, he says, "a simple and direct reading" of the textual language.<sup>102</sup> Likewise, Akhil Amar specifically rejects Ely's bifurcated

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nationality in fact and in law, see generally Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411 (1997).

<sup>99</sup> See ELY, *supra* note 19.

<sup>100</sup> One way of expressing this divide in textual terms might be to say that while aliens are clearly not "Fourteenth-Amendment-first-sentence citizen[s]," *Rogers v. Bellei*, 401 U.S. 815, 827 (1971), they are in many respects, Fourteenth-Amendment-second-sentence citizens.

<sup>101</sup> Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1149 (2000). On interpreting the closely analogous Privileges and Immunities Clause of Article IV, Justice O'Connor observed, "[t]he word 'Citizens' suggests that the Clause also excludes aliens. Any prohibition of discrimination aimed at aliens . . . must derive from other constitutional provisions." *Zobel v. Williams*, 457 U.S. 55, 74 n.3 (1982) (O'Connor, J., concurring) (citations omitted).

<sup>102</sup> Michael Kent Curtis, *Two Textual Adventures: Thoughts on Reading Jeffrey Rosen's Paper*, 66 GEO. WASH. L. REV. 1269, 1272 (1998).

reading of the Clause, maintaining that the Clause is best read as “defining the rights of Americans as Americans.”<sup>103</sup>

The assumption that citizenship is the preserve of citizens has also been voiced by some scholars who have criticized the citizenship revival in constitutional and political discourse. Scholars have argued, on that basis, that a revitalization of citizenship will almost certainly work to the detriment of aliens. In my own work, I have warned of such a consequence, contending that, as a rhetorical and practical matter, treating “citizenship” as the measure of full political and social inclusion may implicitly work to exclude persons who lack citizenship by legal definition.<sup>104</sup> Once again, the operant assumption here is that the status and substance of citizenship necessarily converge. If rights are conceived as a kind of citizenship, in this view, then aliens will be unjustly disadvantaged.

On its face, the notion that citizenship is the exclusive preserve of citizens is hardly a surprising proposition. Among other things, it seems natural to treat variants of the same root word as closely related attributes. Common sense understandings tend to regard the term “citizenship” as the state of being a citizen,<sup>105</sup> and “citizen” as the identity of one who enjoys citizenship. This reciprocal and mutually-referential sort of definition is reflected in much of the theoretical scholarship about citizenship. In political and legal theory, citizenship’s subjects are often defined entirely derivatively, by reference to their possession of substantive citizenship, and citizenship’s substance is likewise defined in relation to what the subjects of citizenship possess or enjoy or do. Civic republicans, for example, approach citizenship as a state of purposeful engagement in the life of the political community; for them, active self-governance is citizenship’s substance. And in this tradition, when a person exercises or enjoys or enacts such citizenship, she becomes “a citizen” by definition. Conversely, a citizen in the republican sense is understood to be a person who is actively engaged in the process of the political community’s process of self-

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<sup>103</sup> AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 364 n.42 (1998). For a similarly skeptical discussion of Ely’s reading, see also Michael J. Perry, *Brown, Bolling and Originalism: Why Ackerman and Posner (Among Others) Are Wrong*, 20 S. ILL. U. L.J. 53, 61 n.44 (1995). See also T. Alexander Aleinikoff, *Citizenship Talk: A Revisionist Narrative*, 69 *FORDHAM L. REV.* 1689, 1694 n.32 (2001) (assuming that non-citizens cannot claim the protection of the Privileges and Immunities Clause); Levin, *supra* note 43, at 586 (“The 1866 [Civil Rights] Act envisioned a different set of beneficiaries than the Amendment did. The Amendment returned to the language of citizenship . . . [whereas] the civil rights enumerated in the 1866 Act inured to the ‘inhabitants of every race.’”); Karst, *supra* note 6, at 42 (“[T]he privileges and immunities clause [sic] is addressed explicitly to the rights of citizens.”).

<sup>104</sup> Bosniak, *supra* note 17; Bosniak, *supra* note 21, at 29–36.

<sup>105</sup> For example, *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 245 (1969), defines “citizenship” as “the status of a citizen, with its attendant duties, rights and privileges.”

government; and when a person is a citizen, she or he is, by definition, practicing “citizenship.”<sup>106</sup>

In the prevailing view then, a subject of citizenship is simply one who enjoys citizenship in substantive terms, and substantive citizenship is simply what citizens have or do. Substance and subjects are not independent attributes of citizenship; they are merely different ways of expressing the same citizenship-related condition.

Yet as we have seen, this is not the only understanding scholars maintain of the relationship between the subjects and the substance of citizenship. Indeed, in American constitutional discourse, the relationship between these attributes of citizenship is often regarded as distinctly fractured. The second-class citizenship critique, first of all, specifically recognizes that the subjects and substance of citizenship do not always converge; people not infrequently possess citizenship status without enjoying much in the way of what we consider to be the substance of citizenship.

The status of aliens presents another possibility of disjuncture between citizenship’s subjects and its substance. Immigration commentators have often noted that today, lawful permanent resident aliens “live lives largely indistinguishable from those of most U.S. citizens . . . exercis[ing] most constitutional rights on the same terms as native-born and naturalized citizens.”<sup>107</sup> To the extent the exercise of such rights is characterized as the enjoyment of “citizenship”—and describing rights in the language of citizenship is increasingly common—we will face the prospect of what we can only call “alien citizenship”—or more to the point, “noncitizen citizenship.” While apparently paradoxical, such neologisms make clear that the American conception of constitutional citizenship is partially split, with the “who” and the “what” of citizenship not always neatly lined up.

### *E. Is Citizenship for Aliens Unjust?*

Most constitutional scholars today criticize this lack of alignment when it takes the form of second-class citizenship. Most assume, in other words, that if a person possesses the status of citizenship, she ought to fully possess the substance of citizenship as well. As we have seen, this is a critically important staple of progressive constitutional thought. To grant membership in formal terms while denying protections and privileges enjoyed by other members is simply unjust exclusion. To use the fact of a person’s nominal membership as a smokescreen for their de facto exclusion is rank hypocrisy. This seems clear.

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<sup>106</sup> As one theorist has written, “Within civil republicanism, citizenship is an activity or a practice, and not simply a status, so that not to engage in the practice is, in important senses, not to be a citizen.” Adrian Oldfield, *Citizenship and Community: Civic Republicanism and the Modern World*, in *THE CITIZENSHIP DEBATES: A READER* 75, 79 (Gershon Shafir ed., 1998).

<sup>107</sup> T. ALEXANDER ALEINIKOFF, *BETWEEN PRINCIPLES AND POLITICS: THE DIRECTION OF U.S. CITIZENSHIP POLICY* 46 (1998); see also Schuck, *supra* note 46.

But does the converse argument hold as well? Is bifurcated citizenship in the other direction—the enjoyment of citizenship rights without the possession of citizenship status—likewise objectionable?

One response to this question would be that such a divide is indeed objectionable, and that citizenship status should be a prerequisite for citizenship rights. The strongest versions of this argument rely on a heavy dose of symbolic nationalism; they espouse the claim that formal citizenship is an essential status for marking who belongs to “we the people.” In this perspective, citizenship status is significant precisely because it separates members from outsiders. Anti-immigrant activists and commentators defend views of this sort,<sup>108</sup> but constitutional analysts have as well. Jeffrey Rosen, for instance, has argued that the Supreme Court should “resurrect[ ] the distinction between citizens and aliens . . . [and thereby] resurrect the meaning of citizenship itself as something more than a pale and disembodied legalism.”<sup>109</sup>

Such views have also been expressed by more progressive scholars. William Eskridge, for instance, has recently defended the “proposition that the ‘privileges or immunities of citizens of the United States’ are those entailing obligations as well as rights that set apart the full membership in the political community from the outsider, or alien.”<sup>110</sup> This is not merely an interpretive statement about the meaning of the privileges or immunities clause: it is an affirmative claim, as well, about the proper relationship between citizenship rights and citizenship status—a claim that important citizenship rights are properly confined to those possessing the status.

Despite the somewhat inflammatory phrasing, Eskridge’s is not entirely an outlying view. Many people assume that citizenship status “has to count for something,”<sup>111</sup> that it must be consequential,<sup>112</sup> and they assume that its consequentiality resides, in part, in assured and exclusive access to certain rights (and responsibilities). Indeed, the notion that citizenship status ought to be a prerequisite

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<sup>108</sup> See, e.g., GEORGIE ANN GEYER, *AMERICANS NO MORE* (1996).

<sup>109</sup> Jeffrey Rosen, *Exclusion, Discrimination and the Making of Americans: America In Thick and Thin*, *NEW REPUBLIC*, Jan. 5 & 12, 1998, 29, 36 (reviewing ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VIEWS OF CITIZENSHIP IN U.S. HISTORY* (1997)); see also Frederick Schauer, *Community, Citizenship, and the Search For National Identity*, 84 *MICH. L. REV.* 1504, 1515 (1986) (arguing that citizenship status serves as the principal mechanism for social cohesion and common identity in the United States, and arguing that citizenship status must therefore count for something in order to serve this “community-bonding function”); Schuck, *supra* note 46.

<sup>110</sup> William N. Eskridge, Jr., *supra* note 15, at 1726. Eskridge goes on to write that “the Court’s jurisprudence ought to read the Equal Protection Clause differently, in some respects, for citizens than for noncitizens.” *Id.* at 1727.

<sup>111</sup> See *The Slaughter-House Cases*, 83 U.S. at 114 (Bradley, J., dissenting) (“In this free country . . . citizenship means something.”).

<sup>112</sup> William Rogers Brubaker, *Introduction*, in *IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA* 1, 4 (William Rogers Brubaker ed., 1989) (citizenship in its ideal form will be “consequential,” among other things, meaning that it “should entail important privileges”).

for the enjoyment of at least some citizenship rights is presupposed by anyone who supports continued denial to aliens of the right to vote—a commonly accepted feature of even the most liberal and egalitarian democratic states today.<sup>113</sup> The citizen voting rule represents a rather weak version of the principle that citizenship status should be necessary for citizenship rights in that it confines itself to only one right rather than many. Nevertheless, the principle is widely accepted in this context.

On the other hand, it is striking to note the degree to which the “citizenship for citizens” principle does not much characterize the state of the law in this country, at least beyond the franchise. As many scholars have noted, most aliens—including undocumented aliens—are afforded a broad range of constitutional (as well as statutory) rights which in some respects render them indistinguishable from citizens.<sup>114</sup> This is a function of our constitutional system’s guarantee of rights to “persons” rather than “citizens” in most cases—a state of affairs that has been forcefully defended by many scholars over the years. Their basic argument is that “personhood” embodies a powerful ideal of universality, one which represents a core commitment of our constitutional system.<sup>115</sup>

Precisely because of this universalist commitment, most of those who defend the personhood model would not regard the extension of citizenship rights to those without citizenship status as morally reprehensible; indeed, they regard it as entirely necessary. From their perspective, the two sorts of citizenship misalignment discussed here—rights without status and status without rights—cannot be regarded as moral equivalents. As a supporter of personhood-based conceptions of rights,<sup>116</sup> I believe they are clearly right about this. So long as citizenship status is made available to

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<sup>113</sup> *But see* text accompanying notes 80–81 (discussing alien voting as an historical matter).

<sup>114</sup> *See also* Peter H. Schuck, *Citizenship (Update 1)*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 366, 366 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000) (“As a result of a steady expansion of the Equal Protection and due process principles, legal resident aliens today enjoy almost all the significant rights and obligations that citizens enjoy.”).

<sup>115</sup> It is this assumption that has rendered the post 9/11 establishment of military tribunals for accused noncitizen terrorists highly controversial. By design, these tribunals provide an adjudicative process stripped of important due process guarantees for the accused. These procedures would, in ordinary circumstances, be deemed to violate basic precepts of constitutional law, at least as to those aliens within the United States. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (all persons within the territory of the United States are entitled to the protections guaranteed by the Fifth and Sixth Amendments). Times of declared national emergency are not ordinary times, however, and few commentators expect that the courts will soon invalidate the order establishing the tribunals.

<sup>116</sup> *See, e.g.*, Bosniak, *Exclusion and Membership*, *supra* note 14; Bosniak, *Difference That Alienage Makes*, *supra* note 14; Linda S. Bosniak, *Immigrants, Preemption, and Equality*, 35 *V.A. J. INT’LL.* 179 (1994); Linda Bosniak, *Opposing Proposition 187: Undocumented Immigrants and the National Imagination*, 28 *CONN. L. REV.* 555 (1986); Bosniak, *supra* note 17.

noncitizens on fairly liberal terms,<sup>117</sup> granting what we often call “citizenship rights” to status noncitizens is not a constitutional wrong, but instead gives appropriate expression to the Constitution’s universalist commitments.

### III. UNIVERSAL CITIZENSHIP AND BOUNDED CITIZENSHIP

But even if citizenship for aliens is not objectionable in the way that second-class citizenship is, there remains the question of whether the notion of “alien citizenship” is coherent by its own terms. Can Ely, Bobbit, Karst, and the others persuasively maintain that persons constitute the rightful subjects of most constitutional rights, while at the same time characterizing the substance of those rights as a form of citizenship?<sup>118</sup> How far can the claim of citizenship for aliens extend?

At one level, answering this question is a matter of constitutional interpretation. Certainly, the scholars I have focused on see themselves as making interpretive arguments about the meaning of the Fourteenth Amendment; they are interested precisely in how that amendment accommodates (or fails to accommodate) the mandates of personhood rights and citizenship. Should the Constitution, after the Fourteenth Amendment’s passage, be read as “now identif[ying] personhood with United States citizenship,”<sup>119</sup> or did the Amendment intend a sharp divide between them?

There are various aspects to the debate in the constitutional literature. Much of the debate has taken the form of a dispute over the relationship between the Equal Protection and Due Process Clauses (which speak of persons), on the one hand, and the Privileges or Immunities Clause, on the other. Scholars have asked, among other things: Are these clauses to be read as overlapping in meaning?<sup>120</sup> If so, is the Privileges or Immunities Clause redundant? If not, what does its reference to “the rights of citizens” add to the mix (read both in light of and in spite of *Slaughterhouse*)?<sup>121</sup> Are the rights referred to narrower than the rights guaranteed to

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<sup>117</sup> The concern is that noncitizens not be locked permanently into alienage status. For an important discussion of the injustice associated with permanent alienage, see MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

<sup>118</sup> Others have formulated arguments structured in this way. See, e.g., Aleinikoff, *supra* note 4, at 977 (“In his dissent in *Plessy v. Ferguson*, Harlan eloquently envisions a national polity of free persons equally enjoying the fundamental rights of citizenship.”).

<sup>119</sup> Christopher L. Eisgruber, *supra* note 35, at 71.

<sup>120</sup> Karst, *supra* note 6, at 15 (explaining that the Fourteenth Amendment’s framers “[made] no serious effort to differentiate the functions of the various clauses” of Section I).

<sup>121</sup> See, e.g., Levin, *supra* note 43, at 609–11, 614 (arguing that the Privileges or Immunities Clause is concerned with “the majoritarian, structural, and participatory rights of citizens,” and embodies commitments to “civil republicanism and participatory virtues,” unlike the Due Process and Equal Protection clauses which address “the substantive rights of personhood,” namely, rights to private autonomy).



persons in the other clauses?<sup>122</sup> Much ink has been spilled on these and related questions in the constitutional commentary, and scholars remain widely divided on these issues.

But assessing the coherence of the idea of alien citizenship is a matter that requires going beyond a parsing of constitutional history and text; it requires us to consider, as well, questions of normative constitutional theory. As Karst has written, citizenship—equal citizenship—is not merely a technical constitutional concept; it is also “an ideal, a cluster of value premises.”<sup>123</sup> To evaluate the plausibility of the concept of alien citizenship, therefore, we need to consider it in light of these premises.

I have argued that any claim to the effect that aliens do and should enjoy aspects of substantive citizenship effectively amounts to a claim that the constitutional tradition which accords rights to persons is perfectly compatible with an understanding of rights conceived as a form of citizenship. The question we are faced with, therefore, is whether the claim is true: whether the constitutional commitments of rights-to-persons and the constitutional conception of rights-as-citizenship are indeed complementary. The answer, it seems to me, is that their compatibility only goes so far. This is because rights-citizenship is usually conceived as embodying not only universalist values, but nationalist values as well.

On first reading, the ideal of equal citizenship seems inextricably linked to an ethic of rights based on personhood. As many commentators have argued, the principle of equal citizenship embodies a commitment to universality. Kenneth Karst writes that under this principle, “[e]very individual is . . . presumptively entitled to treatment in our public life as a person . . . deserv[ing of] respect.”<sup>124</sup> The ideal of equal citizenship is grounded in a commitment to justice and recognition “for all.”<sup>125</sup> It is this grand universalism, which accords rights to persons by virtue of their common humanity, that accounts for much of the concept’s powerful political resonance.

Yet upon further review, it becomes clear that “everyone” does not quite mean *everyone*. For despite equal citizenship’s professed commitment to universality, the universality championed is, in fact, a circumscribed one. The constraints on universality’s scope are the result of the other core animating ideal of the equal citizenship principle—that of community membership, or “belonging,” in Karst’s

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<sup>122</sup> See, e.g., BERGER, *supra* note 41, at 240 (“All in all, it will not do to read the rights of ‘persons’ more broadly than those that were conferred on ‘citizens.’”). But see Earl M. Maltz, *The Constitution and Nonracial Discrimination: Alienage, Sex, and the Framers’ Ideal of Equality*, 7 CONST. COMMENT 251, 264, 271 (1990); Rosen, *supra* note 31, at 1245 (“There seems to have been a general consensus that, whatever the Equal Protection Clause guaranteed, it was something narrower than the Privileges or Immunities Clause.”).

<sup>123</sup> Karst, *supra* note 6, at 5.

<sup>124</sup> Karst, *supra* note 74, at 248.

<sup>125</sup> KARST, *supra* note 70, at 1.

term. The notion of belonging is insistently inclusive within the community. Yet the value of “belonging” also presupposes community boundaries—boundaries which ultimately divide insiders from outsiders.<sup>126</sup> “By drawing a circle and designating those within the circle as sovereign and equal,” Alex Aleinikoff has written, “the concept of citizenship perforce treats those outside the circle . . . as less than full members.”<sup>127</sup>

Most theorists of equal citizenship have tended to disregard citizenship’s exclusionary aspect in their work. Like many social and political theorists, they “tend[ ] to take the existence of a bounded national ‘society’ for granted and to focus on institutions and processes internal to that society.”<sup>128</sup> Their focus on citizenship within the national community, in turn, allows them to treat citizenship as a universalist ideal with an inherently expansive logic. Karst, for instance, writes of equal citizenship’s “expanding . . . circle of belonging,”<sup>129</sup> though he has always acknowledged that the process of inclusion remains incomplete. This expansive conception of citizenship was expressed by political theorist Michael Walzer, who similarly posits a citizenship that progressively incorporates outsider groups. He writes: “Slaves, workers, new immigrants, Jews, Blacks, women—all of them move into the circle of the protected, even if the protection they actually get is still unequal or inadequate.”<sup>130</sup>

This statement captures the predominant conception of citizenship among mainstream constitutional scholars. Focusing on the nation’s interior, they approach citizenship—at least ideally—as a source of progressively inclusive and egalitarian values.<sup>131</sup> It has thus fallen to those scholars specifically concerned with the community’s threshold to attend to citizenship’s nationally-exclusionary dimension.<sup>132</sup> Most often, it is the analysts concerned with immigration and with the law’s constraints on access to citizenship status who acknowledge and examine citizenship’s boundary-enforcing aspect.<sup>133</sup>

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<sup>126</sup> Bosniak, *supra* note 17.

<sup>127</sup> T. Alexander Aleinikoff, *Citizenship (Update 2)*, ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 368 (Leonard W. Levy & Kenneth L. Karst eds., 2000).

<sup>128</sup> Brubaker, *supra* note 112, at 22; *see also* CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1979).

<sup>129</sup> KARST, *supra* note 70, at 3.

<sup>130</sup> Michael Walzer, *Citizenship*, in POLITICAL INNOVATION AND CONCEPTUAL CHANGE 211, 217 (Terence Ball et al. eds., 1996).

<sup>131</sup> This is true of most political and social theory concerned with citizenship as well. *See generally*, Bosniak, *supra* note 17.

<sup>132</sup> I should note that it is not only constitutional scholars who tend to ignore citizenship’s threshold aspects. Immigration scholars, for the most part, also fail to engage with the kind of equal citizenship discourse generated in mainstream constitutional theory.

<sup>133</sup> Something of a division of labor has developed in the citizenship field, pursuant to which threshold questions regarding both access to, and the significance of, formal national citizenship

Yet while most scholars who champion the concept of equal citizenship tend to ignore citizenship's exclusionary face, it is ultimately presupposed in their project. First of all, as I have said, constitutional scholars often characterize equal citizenship not merely as the universal enjoyment of rights but also as the experience of community belonging or membership. Communities, of course, have insides and outsides which are constituted by some sort of boundary, however permeable it may be.

Furthermore, many constitutional theorists make their case on behalf of equal citizenship by linking it to a particular form of community belonging which they express through the concept of "national union" or "national unity."<sup>134</sup> Karst, for instance, writes that "[t]he union of the American people is a constitutional value of the first importance."<sup>135</sup> And it is a value that is inextricably linked with the value of equal citizenship; national unity is seen as a precondition for the practice of equal citizenship, and equal citizenship, in turn, is viewed as a necessary condition for the continued well-being of the community.<sup>136</sup> In Karst's view, "constitutional equality can be seen as part of the social cement that holds our nation together,"<sup>137</sup> while the "interdependence of citizens that is the foundation for the national union" likewise serves to "strengthen the material and moral foundations of equal citizenship."<sup>138</sup> A number of other constitutional scholars have similarly linked equal citizenship with a normative conception of "national unity."<sup>139</sup>

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status are treated as distinct from questions about the nature and quality of citizenship as practiced within the political community. I have written elsewhere: "The former questions are usually confined to the domain of immigration scholarship, while the latter are treated as political and constitutional theory's core enterprise." *Id.* at 965.

<sup>134</sup> In the Supreme Court's recent decision in *Saenz*—a case which has been regarded by many commentators as breathing new life into the Privileges or Immunities Clause—the majority opinion concludes with what F.H. Buckley calls "a paean to national unity." Buckley, *supra* note 3, at 233. As Justice Stevens writes, "The Fourteenth Amendment, like the Constitution itself, was, as Justice Cardozo put it, 'framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.'" *Saenz v. Roe*, 526 U.S. 489, 511 (1999) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)).

<sup>135</sup> Karst, *supra* note 16, at 549.

<sup>136</sup> *Id.*

<sup>137</sup> Karst, *supra* note 74, at 280.

<sup>138</sup> Karst, *supra* note 16, at 571; *see also* KARST, *supra* note 70, at 2 ("Equality and belonging are inseparably linked: to define the scope of the ideal of equality in America is to define the boundaries of the national community.").

<sup>139</sup> *See, e.g.*, Buckley, *supra* note 3, at 223–24, 232 (proposing a "nationalist account of the Privileges or Immunities Clause" according to which "basic constitutional liberties are constitutive of the American identity and deserve support as a symbol of American nationalism"); Mark Tushnet, *Thinking About the Constitution at the Cusp*, 34 AKRON L. REV. 21, 34 (2000) ("In important ways the Constitution, with its opening words 'We the People of the United States,' is a document *about* national unity; a document that tries to create—at least through rhetoric—a single

None of these scholars appears to see any inherent tension between the normative commitments associated with national unity and equal citizenship's universalist commitments. On the contrary, they regard equal citizenship and national unity as mutually necessary and mutually reinforcing parts of a whole. And they are surely right that citizenship's dual commitments are often productively complementary within the ambit of the nation. In particular, it seems indisputable that schisms internal to the nation along class or caste or state lines have thwarted struggles for universal and equal rights within the nation; and conversely, it is clear that a sense of national identification and community solidarity has animated many efforts to give content and effect to the equal citizenship principle in this country.

Yet while these constitutional scholars apparently regard the ideal of national unity as an antidote to divisiveness and fragmentation *internal* to the nation,<sup>140</sup> I would contend that the practice of ensuring the "belonging" and "unity" of the nation's members simultaneously, and inevitably, signals the existence of a sharp divide between insiders and outsiders to the nation. For one thing, the very rhetoric of national unity rather unavoidably serves to conjure up the specter of foreign threat. In general, political and scholarly discourse rallying to a position of "national unity" is quite often meant to evoke a defensive posture in relation to a danger posed by non-national outsiders—at least as often as (and in the recent period, far more than)—to evoke a domestic campaign against internal fragmentation and divisiveness.<sup>141</sup>

While I am quite certain that those scholars who link equal citizenship with the ideal of national unity have no intention of conveying any such defensive and nationalist message, the term's reverberations are hard to deny. And even if we discount such paranoiac associations, the ideal of "national unity" remains essentially a nationalist construct in ethical terms. Describing national unity as a foundation of the equal citizenship principle at the very least conveys the message that we maintain a special commitment to the well-being of members of our own national community—that we feel a kinship with them and maintain moral obligations to them above all others.<sup>142</sup> In this ethical nationalist formulation, we still presume a class of

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people of the United States, notwithstanding our wide differences."); Eisgruber, *supra* note 5, at 1336 (describing "political unity" as a central constitutional principle); BLACK, *supra* note 5; Eskridge, *supra* note 15.

<sup>140</sup> This is made especially clear in KARST, *supra* note 70, at 177–81.

<sup>141</sup> While the term can no doubt be used in both senses, its double meaning or double connotation is inescapable, notwithstanding that its users in this context do not intend to deploy the term this way. The claim I make here is that certain political phrases do certain kinds of rhetorical work quite independent of the speaker's intention.

<sup>142</sup> Mark Tushnet articulates an explicit version of this argument. In a recent book, he endorses a vision of constitutional law in which people are committed to a national community rather than a universal one. He urges that:

[T]he people of the United States continue to constitute ourselves by a commitment to universal human rights. We are citizens of the United States—not citizens of the world at large, or cosmopolitans indifferent to the place we happen to find ourselves in—because of

foreigners whose existence defines a national “us,” and although they are not constructed as overtly dangerous, their experiences and interests are nevertheless assumed to be of lesser significance to us than those of our compatriots.<sup>143</sup>

In sum, while constitutional scholars thus tend to avoid direct attention to citizenship in its bounded aspect and focus on the community’s interior, their substantive accounts of equal citizenship within the nation often presuppose such boundaries. Citizenship’s universalism is, in this regard, a circumscribed universalism, constrained by a concurrent commitment to ethical nationalism.

That the normative ideal of equal citizenship in constitutional thought is, in the end, a nationally-bounded universalist project of course poses important questions at the level of political theory—including questions about the moral justifiability of preferring the interests of national insiders over national outsiders in a world characterized by vastly unequal life chances.<sup>144</sup> While these are pressing matters, I am concerned for the moment not so much with the legitimacy of nationalism per se as with understanding the relationship between citizenship’s nationalist and universalist commitments in the first instance. How can citizenship be both universalist and bounded simultaneously?

To the extent that the division between citizenship’s dual commitments is acknowledged by scholars at all, the usual assumption is that each applies to a different jurisdictional sphere or domain.<sup>145</sup> It is presumed, as a rule, that citizenship’s nationalist commitments are relevant at the borders, facing outward, and that citizenship’s universalist commitments are relevant within the community, facing in.

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that commitment . . . . Whatever the ultimate scope of the Declaration’s principles, the people of the United States do not yet have general responsibility for the well-being of people all over the world. At least for the time being, we can limit the benefits of *our* welfare state to those who are in some meaningful sense part of us.

MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 191, 193 (1999).

<sup>143</sup> This is implicit in communitarian theory, and sometimes made explicit. *See* Oldfield, *supra* note 106, at 81.

Citizenship is exclusive: it is not a person’s humanity that one is responding to, it is the fact that he or she is a fellow citizen, or a stranger. In choosing an identity for ourselves, we recognize both who our fellow citizens are, and those who are not members of our community, thus who are potential enemies.

*Id.*

<sup>144</sup> *See generally* GLOBAL JUSTICE: NOMOS XLI (Ian Shapiro & Lea Brilmayer eds., 1999).

<sup>145</sup> Something resembling this common-sense model was articulated by Michael Walzer in SPHERES OF JUSTICE. *See* WALZER, *supra* note 117. For discussion of Walzer’s argument about the proper reach of the membership sphere and implications for the treatment of aliens, see Bosniak, *Difference That Alienage Makes*, *supra* note 14.

It is presumed, in other words, that while citizenship embodies a universalist ethic within the community, it is exclusionary at the community's edges.<sup>146</sup>

This Janus-like image of citizenship is often accurate—but not always. On the one hand, citizenship's universalist commitments are sometimes brought to bear at the nation's borders. Humanitarian admissions policies, and rules requiring due process in deportation proceedings, are powerful examples.<sup>147</sup> On the other hand, and more significant here, citizenship's exclusionary commitments are not always confined to the state's territorial perimeter, but are sometimes brought to bear even *within* the nation's territory. When this happens, principles of universal citizenship and bounded citizenship occupy the same (internal) terrain.<sup>148</sup>

The case of aliens makes this clear—and here we come full circle. On the one hand, the equal citizenship principle regards aliens as entitled to equal regard and recognition as persons residing in our community. Karst argues that “it is important to extend most of the content of the equal citizenship principle to aliens . . . because for most purposes [aliens] are members of our society.”<sup>149</sup> This is the universalist strand of the equal citizenship principle at work, and it has been highly influential, for aliens do enjoy many fundamental rights as members. At the same time, however, Karst also suggests that aliens—even lawful permanent resident aliens—may be properly regarded as outsiders to the nation's “political community” by virtue of the primary allegiance they maintain to their home states. As a consequence, he maintains, they may legitimately be denied political rights, including the right to vote.<sup>150</sup> The principle of equal citizenship, in this context, permits and perhaps even requires, the exclusion of outsiders from the political community—the same community in which universal equal citizenship is practiced.

The condition of undocumented immigrants pointedly illustrates the dynamic. The equal citizenship principle is usually understood to demand the extension of core constitutional rights to the undocumented. The Supreme Court expressed the point plainly: “Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to [basic] constitutional protection.”<sup>151</sup> Yet many proponents of equal citizenship also tolerate the exclusion of these immigrants—particularly the culpable adults<sup>152</sup>—from other core benefits of membership,<sup>153</sup> and most seem to

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<sup>146</sup> See, e.g., ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* 21 (1992) (“Although citizenship is internally inclusive, it is externally exclusive.”).

<sup>147</sup> See generally Bosniak, *Difference That Alienage Makes*, *supra* note 14.

<sup>148</sup> *Id.*

<sup>149</sup> KARST, *supra* note 70, at 45.

<sup>150</sup> *Id.* Karst's argument does not hold up given that we today consider dual citizens—who likewise maintain allegiance to other state—as entitled to vote in this country.

<sup>151</sup> *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

<sup>152</sup> I refer to the contrast drawn in Justice Brennan's opinion in *Plyler v. Doe* between “innocent children,” who deserve special protection, and their culpable parents who “elect to enter

regard as acceptable, and perhaps even necessary, their subjection to deportation on grounds of unlawful entry or presence.<sup>154</sup> Significantly, the threat or actuality of deportation works to undercut equal citizenship not merely directly but also indirectly: these immigrants are often unwilling to invoke the rights they are formally entitled to for fear of coming to the attention of the immigration authorities.<sup>155</sup> The result, once again, is that while equal citizenship requires rights for everyone, it also tolerates, and perhaps even demands, the exclusion of certain territorially-present non-nationals—with the effect that the inclusive force of the principle of equal citizenship is both directly and indirectly compromised.

The ambiguous status of aliens under an equal citizenship regime makes clear that the marriage of personhood with equal citizenship proposed by Karst and the others is bound to be a partially unstable union. However compatible the idea of equal citizenship is with rights for persons *qua* persons in most cases, the idea of citizenship also presupposes a bounded national community. This is a community characterized by exclusionary commitments—political and territorial commitments—that will inevitably clash with a pure personhood rights approach. And it is precisely in the context of aliens' rights where that tension is most likely to emerge.

For all of these reasons, the claim by Karst, Bobbit, Ely, and the others to the effect that aliens can be the subjects of citizenship, and their suggestion that the revitalization of the idea of constitutional citizenship need not, in principle, result in a total diminution of rights for aliens, each seem quite plausible. There is, nevertheless, an intrinsic limit to the citizenship that aliens can enjoy. There is something of a second-class citizenship—though this is not second-class citizenship in its classical form, pursuant to which those afforded the formal status of citizenship are nevertheless denied many of the rights of citizenship in law and in practice. This is, instead, a second-class citizenship in which the individuals involved enjoy many of the substantive rights of citizenship even in the absence of formal citizenship status; and yet the scope of the rights they enjoy is, at the same time, constrained by virtue of citizenship's other substantive commitments which include a commitment to national exclusivity and closure.

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our territory by stealth and in violation of our law," and who "should be prepared to bear the consequences, including, but not limited to, deportation." *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

<sup>153</sup> See, e.g., Schuck, *supra* note 46; SMITH, *supra* note 47; Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. Rev. 54, 96 & n.110 (1997) (stating that while the people subject to the U.S. government's sovereign power "deserve a fair share of the benefits that result from the collective enterprise in which they participate," "[i]llegal aliens, who have violated the laws of the collective enterprise, may forfeit any claim to share in the common good").

<sup>154</sup> Efforts to enact a new amnesty or legalization program, which in the early part of 2001 looked promising, were shelved after the terrorist attacks of September 11.

<sup>155</sup> Bosniak, *Exclusion and Membership*, *supra* note 14, at 986–87.

## IV. CONCLUSION

Constitutional citizenship is a divided construct. It is divided conceptually—as between status and rights—and it is divided normatively—through its embodiment of both universalist and nationalist commitments. These divisions complicate the efforts by scholars to revive constitutional citizenship as the basis for our individual rights jurisprudence. At the very least, it requires those promoting the citizenship turn in constitutional law to recognize citizenship’s multiple dimensions, and to engage directly with them in their work. As an important part of this process, we should hope to see increasing intellectual incursions—in both directions—across the professional divide that now separates scholars of rights-citizenship and status-citizenship. We should also hope for more direct acknowledgment among equal citizenship advocates of the usually unrecognized premises of normative nationalism embedded in their project.

I do not, on the other hand, expect that increased engagement across citizenship’s various fracture lines will lead, in the end, to a more coherent and unitary theory of constitutional citizenship. On the contrary, I suspect that it will simply put us in a better position to understand constitutional citizenship’s ultimate lack of unity and coherence. In his sweeping historical work on American citizenship, political scientist Rogers Smith describes what he calls “the huge iceberg of anomalies and contradictions that lurk below the surface of American citizenship laws.”<sup>156</sup> Smith’s description, it seems to me, aptly characterizes not merely our citizenship laws<sup>157</sup> but the concept of constitutional citizenship itself. This is our condition, and following Smith’s example, we ought to come directly to terms with it.

I have argued elsewhere that citizenship, in general, is a concept whose meaning is highly contested and multivalent.<sup>158</sup> In constitutional law, the meaning of citizenship is only somewhat more certain. We know, more or less, what is meant when we speak of citizenship as status, but beyond this lies much uncertainty. To what extent is the Constitution concerned with the rights of citizenship and what, precisely, would those rights be? How, as a textual matter, should we understand the relationship between the citizenships designated in the first and second sentences of the Fourteenth Amendment? What, in normative terms, ought citizenship to stand for in both or either of the Amendment’s citizenship-related clauses?

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<sup>156</sup> ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 13 (1997). Smith goes on to write that “American citizenship . . . has always been an intellectually puzzling, legally confused, and politically charged and contested status.” *Id.* at 14.

<sup>157</sup> By “citizenship laws,” Smith means “the statutes and judicial rulings that have defined what American citizenship [is] and who is eligible to possess it.” *Id.* at 2.

<sup>158</sup> Bosniak, *supra* note 2; see also JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 1 (1991) (“There is no notion more central in politics than citizenship, [yet] none more variable in history, or contested in theory.”).



I think it is fair to say that these are not questions that have fixed answers that will subject themselves to a process of discovery. Rather, constitutional theorists of citizenship are engaged in the process of answering them as we go. Citizenship is a powerful term of political rhetoric which many seek to claim—though again, its precise denotative meaning is highly contested. I personally support understandings of citizenship that are inclusive and universalist, as against nationalist and particularist conceptions. But the first step in any struggle over citizenship's future is to map its present contours. And for such a project, the category of alienage is indispensable.

